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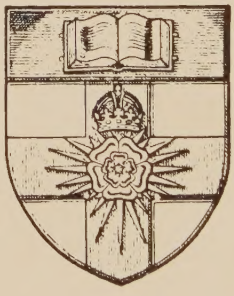

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November 4th, 1867.

THE

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Court of Common Pleas.

REPORTED BY

JOHN SCOTT AND HENRY BOMPAS,

BARRISTERS-AT-LAW.

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OF

THE COURT OF COMMON PLEAS

XXX VICTORIA.

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The Right Hon. Sir William Bovill, C.J.
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CASES

DETERMINED BY THE

COURT OF COMMON PLEAS,

AND BY THE

COURT OF EXCHEQUER CHAMBER,

ON ERROR AND APPEAL FROM THE COURT OF COMMON PLEAS,

IN AND AFTER

MICHAELMAS TERM, XXX VICTORIA.

WORTH *v.* GILLING AND ANOTHER. *Nov.* 2.

Animals—Negligence—Negligently keeping a ferocious Dog—Scienter.

It is not necessary, in order to sustain an action against a person for negligently keeping a ferocious dog, to shew that the animal had actually bitten another person before it bit the plaintiff: it is enough to shew that it has, to the knowledge of its owner, evinced a savage disposition, by attempting to bite.

Port p d
16 L. D
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THE declaration stated that the defendants unlawfully kept a dog of a fierce and mischievous nature, well knowing that the said dog was of a fierce and mischievous nature *and accustomed to bite mankind* (1), and that the said dog, whilst the defendants so kept the same, attacked and bit the plaintiff, whereby the plaintiff was wounded, &c., and was prevented from carrying on his business, and incurred expense for medical and other attendance, &c.

The defendants pleaded,—first, not guilty,—secondly, that they at the said time when &c. carefully and properly kept the said dog chained up on their own land for the protection of their

(1) The words in italics were added by way of amendment at nisi prius.

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property, and that the plaintiff at the said time when &c. was trespassing on the said land without the leave of the defendants,—thirdly, a similar plea, but alleging that the plaintiff, having notice of the premises, carelessly, negligently, and improperly went near to the said dog, and that the injury complained of was caused by his own negligence and want of due and proper care. Issue.

The cause was tried before Willes, J., at the last summer assizes at Hertford. It appeared that the defendants, who were engravers and watch-dial finishers in the neighbourhood of Clerkenwell, had their workshops and counting-house in a paved yard having an entrance in the public street which was common to two or three other tenants of premises in the same yard; that, for the protection of their property, the defendants kept a dog which was chained to a kennel at one side of the yard; that the yard was about twenty feet wide, and the chain about seven feet long; that the plaintiff was going across the yard towards one of the workshops, when the dog attacked and severely bit him in the arm.

The dog had been purchased by the defendants on the 5th of June, 1865, and the injury to the plaintiff was on the 17th of July in the same year.

There was no evidence that the dog had ever before bitten any person; but it was proved that he had uniformly exhibited a ferocious disposition, by rushing out of his kennel when any stranger passed, and jumping up as far as the chain would allow him, barking and trying to bite. One of the other tenants in the yard, who spoke to the savage disposition of the dog, also said he had complained to the defendants about it, and told them that the dog should be more closely secured: but, on cross-examination, he would not say whether this was before or after the injury had been inflicted upon the plaintiff.

On the part of the defendants it was submitted that there was no evidence that the animal was ferocious and accustomed to bite, and at all events none that the defendants knew he had such a propensity.

The learned judge left it to the jury to say whether or not the dog was of a savage and dangerous disposition, and whether the defendants were aware of it and neglected to take due precautions

to guard against injury to persons lawfully coming upon the premises.

The jury returned a verdict for the plaintiff, damages 10*l*.

Thesiger, pursuant to leave reserved to him at the trial, moved to enter a verdict for the defendants or a nonsuit. In order to sustain an action of this sort, the plaintiff is bound to prove that the dog is of a savage and ferocious disposition, and that the defendant had notice thereof: Com. Dig. (1) In *Beck and Wife* v. *Dyson* (2), it was held not to be sufficient to shew that the dog was of a fierce and savage disposition, and usually tied up by the defendant, without proving that he had before bitten some one.

[BYLES, J. In *Judge* v. *Cox* (3), it was ruled by Abbott, C.J., that, in an action for negligently keeping a dog, proof that the defendant had warned a person to beware of the dog lest he should be bitten, was evidence to go to a jury in support of the allegation that the dog was accustomed to bite mankind.

ERLE, C.J. It was not necessary to prove that the dog had actually bitten another person. If the evidence shewed the animal to be of a fierce and savage nature, that it had on former occasions evinced an inclination to bite, that will be enough to sustain the action.]

There was no evidence whatever in this case to shew that the defendants, who had only had the dog in their possession a few weeks, knew that it was ferocious. In *Hartley* v. *Harriman* (4), an averment in a declaration that the defendant's dogs were accustomed to worry and bite sheep and lambs, was held not to be supported by proof that they were of a ferocious and mischievous disposition, and that they had frequently attacked men: Holroyd, J., saying: "If the allegation as to the habit of these dogs were struck out of the declaration, a sufficient cause of action would not remain. Then it follows that it is material, and absolutely necessary to be proved. And it will not do to prove another fact, which, if inserted in the declaration instead of this, might have been quite sufficient to support the action; for, the allegation itself must be proved."

(1) Action upon the Case for Negligence (A. 5).

(2) 4 Campb. 198.

(3) 1 Stark. 285.

(4) 1 B. & A. 620.

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ERLE, C.J. I am of opinion that there should be no rule. Although there was no evidence that the dog had ever before bitten any one, it was proved that he uniformly made every effort in his power to get at any stranger who passed by, and was only restrained by the chain. There was abundant evidence to shew that the defendants were aware of the animal's ferocity; and, if so, they are clearly responsible for the damage the plaintiff has sustained.

WILLES, J. There was evidence that the dog was in the habit of jumping at every one who passed his kennel, endeavouring to bite, and that the defendants knew it. It is true that he did not appear to have succeeded in biting any person until he unfortunately caught the plaintiff. The defendants admitted that the dog was purchased for the protection of their premises. Unless of a fierce nature, he would hardly have been useful for that purpose.

BYLES, J., and KEATING, J., concurred.

Rule refused.

Attorney for plaintiff: *C. Butterfield.*
Attorneys for defendants: *Drew & Wilkinson.*

Nov. 22.

SMITH *v.* GREAT EASTERN RAILWAY COMPANY.

Railway Company—Negligently keeping a Station—Passenger bitten by a stray Dog—Scienter—Evidence for a Jury.

The plaintiff was bitten by a stray dog at a railway station, while waiting for a train. It was proved that at 9 P.M. the dog flew at and tore the dress of another female on the platform; that at 10.30 he attacked a cat in the signal-box near the station, when the porter there kicked him out, and saw no more of him; and that he made his appearance again at 10.40 on the platform, where he bit the plaintiff:—

Held, no evidence to warrant a jury in finding that the company had been guilty of any negligence in keeping the station reasonably safe for passengers.

THE first count of the declaration stated that the defendants wrongfully kept a dog of a fierce and mischievous nature, well

knowing the said dog to be accustomed to bite and attack mankind, and that the said dog, whilst the defendants so kept the same, attacked and bit the plaintiff, whereby she was wounded and injured, and incurred expense, &c.

The second count stated that the defendants, at the time of the committing of the grievances thereinafter mentioned, were the owners and proprietors of a certain railway for the carriage and conveyance of, and in and upon and by which they were used and accustomed to carry and convey, passengers for hire and reward to the defendants in that behalf; that the defendants were then also possessed of a certain railway-station or platform then abutting on the said railway, and upon, along, and over which all persons lawfully being at the said station were used and accustomed, and were authorized and requested by the defendants, to go upon, pass, and re-pass; that, at the time of the committing of the grievances by the defendants thereinafter alleged, the plaintiff was using the said station or platform in a lawful manner, and was requested and authorized by the defendants to go, pass, and re-pass upon, along, and over the said station or platform for a certain purpose for the benefit of the defendants: yet the defendants negligently, improperly, and carelessly managed the said station or platform, and kept the same in a dangerous state, and wrongfully allowed certain ferocious dogs, well knowing the same to be used and accustomed to bite and attack mankind, to be upon the said platform or station, and omitted to provide sufficient servants and porters or accommodation for the safety of the passengers and persons using the said station or platform in a lawful manner, and requested and authorized by the defendants to go, pass, and re-pass upon, along, and over the same, and did not take or use due, reasonable, proper, or any means or precautions to prevent accidents or injuries arising or happening to the passengers and other persons using the said railway or platform in a lawful manner, and authorized and requested by the defendants to go, pass, and re-pass upon, along, and over the same; whereby the plaintiff, while using the said station or platform in a lawful manner, and while going, passing, and re-passing upon, along, and over the same platform as authorized and requested by the defendants, was by reason of the grievances aforesaid, and of the

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negligence of the defendants as aforesaid, attacked, and her leg was bitten and lacerated by one of the dogs aforesaid, and by means of the premises the plaintiff became sick &c., and incurred expense &c.

The defendants pleaded, first, not guilty; secondly, to the second count, that the plaintiff was not using the platform in a lawful manner, and was not requested or authorized by the defendants to go, pass, and re-pass upon, over, and along the said station or platform for a certain purpose for the benefit of the defendants. Issue thereon.

At the trial before Willes, J., at the last assizes for Surrey, the facts which appeared in evidence were as follows:—The plaintiff, a laundress residing at Old Ford, in Essex, on the evening of the 21st of May last (Whit Monday) was on her way as a passenger from the defendants' Lea Bridge Station to Mile End. Whilst waiting for the train at Lea Bridge, she was attacked by a dog, which was described by the witnesses as a middle-sized black dog of the terrier kind, and severely bitten on the leg. This occurred at about twenty minutes to 11 o'clock at night. It was proved that a dog of a similar description, and which was believed to be the same animal, had at about 9 o'clock on the same evening attacked another female whilst on the same platform, and had torn her dress; and that the attention of the company's servants had been called to the circumstance. There was no evidence to shew to whom the dog belonged; and all the people employed at the station,—five persons, besides the station-master,—utterly repudiated it.

The station-master and two of the porters belonging to the station were called as witnesses for the defendants. They stated that the dog was a stranger to them, and that he might have come to the platform with a passenger (of whom there was a considerable crowd on the day in question), or might have got there by a pathway which crossed the line on a level near the station, and to which the public had access: but there was no evidence as to the nature of this alleged way. One of the porters stated that at about half-past 10 o'clock on the same evening, the same or a similar dog entered the signal-box, which was at a short distance from the platform, and flew at a cat there, and that he (the witness) kicked

the dog out, and saw no more of him. These witnesses denied that any communication had been made to either of them about the former misconduct of the dog.

On the part of the defendants, it was submitted that there was no evidence to go to the jury that the company, or any person for whose acts they were responsible, had been guilty of any negligence, or that they had any knowledge or notice of the ferocious character of the dog.

The learned judge declined to nonsuit the plaintiff, but reserved the point for the Court of Common Pleas only; and he left the following questions to the jury:—whether they were satisfied that the dog which tore the dress of the female at 9 o'clock on the same evening was the same animal that bit the plaintiff; whether that was done under circumstances which shewed the dog to be a ferocious and dangerous animal; whether the servants of the company had notice of the fact, and took no measures to prevent a recurrence of it; and whether the station was so kept that by reason of the negligence of the company's servants it was dangerous to persons lawfully coming there.

The jury found all these questions in favour of the plaintiff, and returned a verdict for her with 50*l.* damages.

Ballantine, Serjt., on a former day, pursuant to the leave reserved, obtained a rule nisi to enter a nonsuit, or for a new trial on the ground that the verdict was against the weight of evidence.

Denman, Q.C., and *Francis*, shewed cause. Assuming that the dog did not belong to the defendants or to any of their servants, that will not dispose of the question; it is not essential that the dog should be their property; they are equally responsible for its misconduct if they harboured it or permitted it to be about their premises: *M'Kone* v. *Wood*. (1) It is the duty of the company to keep their stations reasonably free from danger, and they cannot be said to have performed that duty, if, knowing that a dog of the character of this animal was habitually about the station snapping at passengers, they omitted to take effectual means to keep it out or to remove it. And *Stiles* v. *Cardiff Steam Navigation Company* (2) shews that the knowledge of the servants of the company is the

(1) 5 C. & P. 1. (2) 33 L. J. (Q.B.) 310.

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knowledge of the company itself. The circumstance of the dog having already on the same evening attacked another person on the platform, and of his having worried the station-master's cat, shewed sufficiently that it was not an animal which ought to have been permitted to be at large in such a place. It was not necessary to shew that it had actually bitten any person before: *Worth* v. *Gilling*. (1)

[WILLES, J. It was not shewn what had become of the dog between 9 o'clock and 10.40; and several trains must have arrived and departed during that interval.]

Nor was any evidence given as to the nature of the alleged way across the line, or as to whether or not the entrance was kept properly fenced so as to prevent dogs from straying into the station. There was abundant to warrant the jury in coming to the conclusion that the station had been negligently kept.

Patchett (*Ballantine, Serjt.*, with him), in support of the rule. A grievous burthen will be imposed upon railway companies if the doctrine of negligence be extended to a case like this; it will in effect make them insurers against all sorts of casualties upon their lines or at their stations, even in cases where the greatest possible amount of vigilance would not avail to prevent it. To render a person responsible for keeping a ferocious dog, it has always been held that the animal must be one over whom the defendant has some control: Com. Dig. (2) The evidence upon which it is here sought to charge the company was the weakest that could well be conceived. A strange dog is found at a station to which any person, whether a passenger or not, may have access. The station was crowded with holiday people; and it would be too much under the circumstances to expect the servants of the company to be looking after every stray cur that might intrude therein, whether brought by a passenger, or coming by the pathway crossing the line. That the dog who did the mischief was not the property of any person at the station, is clear from the fact of his having attacked the station-master's cat. It was not even proved that he was the same dog of whose conduct complaint was said to have been made at an earlier period of the same evening.

[WILLES, J. It was obviously the same dog. He presented

(1) Ante, p. 1. (2) Action upon the Case for Negligence (A. 5).

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the same appearance, and conducted himself in the same way upon both occasions.]

To charge the company, there must at least be affirmative evidence to shew that their servants omitted to do something which it was their duty to do. It is not enough simply to shew that an accident has happened: see the judgment of Bramwell, B., in *Cornman* v. *Eastern Counties Railway Company*. (1)

ERLE, C.J. I am of opinion that this rule should be made absolute. The action is brought against the company for alleged negligence in omitting to keep their station free from a savage dog: and the question is whether they, by their servants, have failed to exercise that reasonable degree of care which they might and ought under the circumstances to have exercised. It appeared that the defendants possessed a station called the Lea Bridge Station, which was subject to a right of footway for all her Majesty's subjects wanting to cross the line at that spot. I do not stop to inquire what was the nature of that right, or whether it was legally claimed or not. It is enough that it was commonly used. An unknown dog, by some unexplained means, had got upon the platform, and at 9 o'clock in the evening shewed signs of being an animal of dangerous character, by attacking a female there and tearing her dress. Nothing more was seen of the dog until about half-past 10, when he was seen rushing after a cat in the signal-box, whence he was summarily ejected by the man on duty: and a few minutes afterwards he again shewed himself on the platform, and attacked and bit the plaintiff, and was seen no more. I do not see that the company had left undone anything that they reasonably could have done to prevent the mischief. Their servants could not have shot the dog, and it is difficult to see how they could have secured him. He appears to have made a sudden incursion, and to have disappeared as suddenly. I am at a loss to see any evidence upon which the jury could reasonably find that the company had been guilty of negligence.

WILLES, J. I am of the same opinion. The jury, who no doubt were prepared to find everything in favour of the plaintiff, found that the dog was upon the platform through the negligence of the

(1) 4 H. & N. 781, 786; 29 L. J. (Ex.) 94.

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company's servants: and, if the judge was justified in leaving that question to the jury, the verdict should be sustained. But I am of opinion that he was not justified in so doing; or rather that he was right in reserving the question for the Court, because there was no reasonable evidence that they were guilty of negligence in not keeping the dog out of their station. It is not enough to shew that the damage may have occurred through the negligence of the defendants' servants,—even coupled with the suggestion that no sufficient explanation was given of the dog's conduct. The plaintiff must shew something which the defendants might have done, and which they omitted to do, before they can be held responsible for the misfortune which has happened to her. I entirely assent to the doctrine laid down by my Lord to that effect in *Cotton* v. *Wood* (1), adopting what was said by Williams, J., in *Toomey* v. *Brighton Railway Company* (2); and again in *Hammack* v. *White*. (3) In the last-mentioned case, the defendant had bought a horse at Tattersall's, and was trying him in a public and much-frequented thoroughfare, when, notwithstanding the defendant's best efforts to prevent it, the horse swerved on to the foot-pavement and killed a man: and it was held that these facts disclosed no evidence of negligence which the judge was warranted in submitting to the jury. The counsel for the plaintiff, referring to some railway cases, contended that negligence or no negligence was purely a question for the jury, and that the evidence was at all events enough to call upon the defendant to prove that he was riding a reasonably manageable horse. But Erle, C.J., said: "I do not assent to the doctrine that mere proof of the accident throws upon the defendants the burthen of shewing the real cause of the injury. All the cases where the happening of an accident has been held to be primâ facie evidence of negligence, have been cases of contract." Since that decision, the question has arisen in another form, in a case where the defendant was proved to have been doing an act which if done in a careful and reasonable manner would have done no injury, but where the plaintiff sustained damage by reason of the thing having been done carelessly.

(1) 8 C. B. (N.S.) 568; 29 L. J. (C.P.) 333.
(2) 3 C. B. (N.S.) 146; 27 L. J. (C.P.) 39.
(3) 11 C. B. (N.S.) 588; 31 L. J. (C.P.) 129.

That was the case of *Byrne* v. *Boadle* (1), where the plaintiff was walking in the public street, past the defendant's shop, when a barrel of flour fell upon him froma window a bove, and seriously injured him; and it was held that this was sufficient primâ facie evidence of negligence for the jury, to cast on the defendant the onus of proving that the accident was not caused by his negligence. The question was very much considered still more recently in the Exchequer Chamber, in a case of *Scott* v. *London Dock Company* (2), where Erle, C.J., expressing the opinion of the majority of the judges, said: "There must be reasonable evidence of negligence. But, where the thing is shewn to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care." But that case is distinguishable from *Hammack* v. *White* (3) and this case, because there the defendants had in their possession and under their control something which was dangerous unless reasonable precautions were taken to prevent injury to third persons. In such a case it is obvious that the damage must have arisen from some inadvertence or neglect of the defendant or his servants; but the same principle cannot apply where the defendant has no control over that which is the immediate cause of the damage. This distinction is especially applicable here, where the dog which bit the plaintiff was not the dog of the defendants or one over whom they could exercise any control, except by turning it off their premises. And, if we take the positive evidence of the porter as to what took place in the signal-box, it is clear that there was no actionable negligence on the part of the company's servants. It seems the dog in question attacked a cat belonging to the station, and the porter kicked him out, and he ran along the line and escaped his observation among the crowd on the platform, where he immediately afterwards attacked and bit the plaintiff. All that the plaintiff's evidence amounts to is this,—that the dog injured the dress of another female at 9 o'clock, and was again seen among

(1) 2 H. & C. 722; 33 L. J. (Ex.) 13.
(2) 3 H. & C. 596; 34 L. J. (Ex.) 220.
(3) 11 C. B. (N.S.) 588; 31 L. J. (C. P.) 129.

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the crowd at the station at twenty minutes to 11. Taking into consideration the position of the station, the dog may have been absent in the interim, and returned. The evidence on the plaintiff's part, therefore, taken alone, really amounts to nothing; and the evidence of the porter does not shew that any opportunity of getting rid of the dog was neglected by the company's servants.

KEATING, J. I am of the same opinion. Mr. Denman very properly relied upon the circumstance of the dog having attacked another person at the station at an earlier hour on the same evening, and of the notice of the company's servants having been called to the fact. If the dog had remained on the platform after that, without any attempt being made to remove it, I should have thought there was evidence which might have justified the verdict. But it did not appear that the dog was seen again by any servant of the company or by anybody else until half-past 10, when the signal-man, finding him worrying a cat, drove him away. I cannot see any omission on the part of the company of any duty. I therefore think there was nothing which could properly be left to the jury.

Rule ~~absolute discharged~~.

Attorney for plaintiff: *H. A. De Medina.*
Attorney for defendants: *W. H. Shaw.*

Nov. 15.

ARMITAGE *v.* JESSOP.

12 Jur. N.S. 903.

Costs—Execution, Expenses of—Debt recoverable in County Court—Common Law Procedure Act, 1852, *s.* 123.

A plaintiff who recovers a debt not exceeding 20*l.*, although deprived of costs by force of the County Courts Acts, is nevertheless entitled to levy poundage fees and expenses of execution, in addition to the sum recovered, under the 123rd section of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76.

THE plaintiff on the 13th of April, 1866, issued a writ against the defendant claiming 16*l.* 5*s.* debt, and a sum for costs. The defendant admitted the debt, but refused to pay any costs, on the ground that the debt was recoverable in the county court. The plaintiff thereupon delivered a declaration and the defendant

allowed judgment to go by default. The plaintiff signed judgment for the debt only, and after it was signed the defendant's attorneys wrote to the plaintiff's attorneys intimating that they were ready to pay the debt, but would resist any application for costs; but they did not pay nor tender the debt. The plaintiff then issued a fi. fa., under which the sheriff levied the debt and 3*l.* 13*s.* for poundage fees and expenses of execution.

On the 16th of June, Montague Smith, J., upon summons ordered that the 3*l.* 13*s.* with the costs of the application should be repaid to the defendant, conceiving the plaintiff not to be entitled to any costs.

Grantham, having obtained a rule nisi to set aside this order, on the ground, that, although the county-court acts deprived the plaintiff of the costs of the action, he was still entitled to the costs of the execution, under the 123rd section of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), which enacts that, "in every case of execution the party entitled to execution may levy the poundage fees and expenses of the execution, over and above the sum recovered,"

Day shewed cause. The execution was issued contrary to good faith, the defendant's attorneys having previously twice intimated to the plaintiff's attorneys that they were prepared to pay the debt without costs.

[ERLE, C.J. Why did they not tender the money?]

They naturally expected that the plaintiff's attorneys would have made some application for the costs of the cause. Generally speaking, the expenses of the execution would form part of the costs of the cause.

Grantham, in support of the rule. The plaintiff having recovered a verdict was entitled to obtain the fruits of it in the usual way, viz. by execution. And, although he was deprived by the county-court acts of the costs of the action, there is nothing in those acts at all to interfere with the subsequent expenses of execution, which are regulated solely by the 123rd section of the Common Law Procedure Act, 1852.

ERLE, C.J. I am of opinion that this rule should be made

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absolute. The plaintiff having a debt due to him from the defendant of 16*l.* 5*s.*, brought an action claiming 16*l.* 5*s.* debt and a sum indorsed on the writ for costs. The defendant admitted the debt, but declined to pay the costs because the debt was recoverable in a county-court; and, if he had paid the debt, there would have been an end to all further liability. The plaintiff having delivered a declaration, the defendant suffered judgment by default. It is agreed on all hands that the defendant owed the plaintiff 16*l.* 5*s.* After the judgment was signed, the defendant's attorneys wrote to the plaintiff's attorneys intimating that they were ready to pay the debt, but that they would oppose any application for costs. I see no reason why the plaintiff should be obliged to employ his attorneys to apply to the defendant's attorneys for the money: and I see no difficulty in the defendant's bringing it to the plaintiff. The debt not having been paid, the plaintiff issued a fi. fa., under which the sheriff levied the debt and 3*l.* 13*s.* for the costs of execution. An application was then made to my Brother Montague Smith to compel the return of this sum, and he made an order that the plaintiff should refund the money and pay the costs of the application. Upon these facts, I cannot discover that the plaintiff has done anything which can be found fault with. Then, how stands the law? Under the original county-court act, 9 & 10 Vict. c. 95, s. 129, a plaintiff recovering less than 20*l.* in an action of contract in the superior court would have judgment to recover such sum only and no costs. The 11th section of the 13 & 14 Vict. c. 61 excepted the case of a judgment by default. Then came the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), the 123rd section of which provides that, in every case of execution, the party entitled to execution may levy the poundage fees and expenses of the execution, over and above the sum recovered. Then the 30th section of the 19 & 20 Vict. c. 108 enacts that where an action is brought in a superior court to recover a sum not exceeding 20*l.*, and the defendant suffers judgment by default, the plaintiff shall recover *no costs*,—unless a Court or judge shall otherwise direct. The question is whether that includes the poundage fees and expenses of execution. I am of opinion that the enactment that the plaintiff shall not recover costs of suit does not deprive him of the right

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to the costs of execution, where the plaintiff cannot recover the debt without it. Costs of execution are not costs of the action. That seems to be the result of the decision of this Court in *Marquis of Salisbury* v. *Ray*. (1)

WILLES, J. I am of the same opinion. The words of the 123rd section of the Common Law Procedure Act, 1852, are express that, in every case of execution, the party entitled to execution may levy the poundage fees and expenses of the execution, over and above the sum recovered. In the case referred to by my Lord, a decision was pronounced by this Court which clearly shews that the costs of execution are not accessory to the judgment, because it was there held that the costs of a previous abortive writ of fi. fa. cannot be levied under a subsequently issued ca. sa., that is to say, that those costs are accessory to the particular writ of execution only. I think the rule should be absolute to set aside the order of my Brother Montague Smith, but without costs.

BYLES and KEATING, JJ., concurred.

Rule absolute, without costs.

Attorneys for plaintiff: *Rooks, Kenrick, & Crook.*
Attorneys for defendant: *Blakeley & Beswick.*

THE ILFRACOMBE RAILWAY COMPANY *v.* THE DEVON AND SOMERSET RAILWAY COMPANY; *Re* LORD POLTIMORE.

Nov. 24.

Railway Company: Scire facias against Shareholders under 8 & 9 *Vict. c.* 16, *s.* 36—*Filing the return to the fi. fa.—Service of Rule for sci. fa.—Practice.*

To entitle a creditor to a sci. fa. against a shareholder in a railway company, under the 36th section of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), it is not necessary that the sheriff's returns to abortive writs issued against the company should have been actually filed at the time of the motion.

Though the notice to the party sought to be charged must be served personally, the rule nisi for the sci. fa. may be served upon an attorney authorized to accept service for him.

Bridge, on a former day, obtained a rule on behalf of the plaintiffs, calling upon Lord Poltimore to shew cause why a writ

(1) 8 C. B. (N.S.) 193; 29 L. J. (C.P.) 225.

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or writs in the nature of a sci. fa. on the judgment obtained by the plaintiffs in this cause should not be issued against Lord Poltimore as a shareholder of the company of the defendants, to enable the plaintiffs to have execution upon the said judgment to satisfy the plaintiffs in the sum of 10,750*l.* 1*s.* 2*d.*, the amount of the judgment still unpaid, to the extent of his shares in the capital of the defendants' company not paid up, pursuant to the Companies Clauses Consolidation Act, 1845.

The affidavits upon which the motion was founded stated that the defendants were incorporated by the 27 & 28 Vict. c. cccvii, by the name of The Devon and Somerset Railway Company; that judgment was signed in this action against the defendants on the 8th of August, 1866, for 10,750*l.* 1*s.* 2*d.*; that two writs of fi. fa. were issued on the 10th of August last for the purpose of obtaining satisfaction of the judgment against the company, and were directed respectively to the sheriffs of the counties of Devon and Somerset, indorsed to levy 10,750*l.* 1*s.* 2*d.* and costs, and were delivered to the sheriffs on the 11th to be executed; that, on the day the writs were delivered to the sheriffs, and at the time they were issued, the company had not then, as the deponent believed, nor had they now, any office or place of business, but that the company was formed for the purpose of making a railway in the said counties of Devon and Somerset, and those counties only, and they were by their contractor then executing some works in those counties; that, on the 14th of August, the sheriffs of Devon and Somerset respectively returned the writs nulla bona, and that two executions had been previously issued against the defendants in the county of Devon, to which the sheriff was also compelled to return nulla bona; that, with a view of further enforcing payment of the said judgment of the 8th of August, writs of elegit were issued out of this court directed respectively to the sheriffs of Devon and Somerset, upon which inquisitions were duly held on the 22nd and 23rd of August, under which the juries respectively found that the defendants were possessed of no goods and chattels, and that they were possessed of lands (describing them) of the yearly value of 155*l.* 10*s.* 8*d.* in the county of Devon, and of the yearly value of 10*5l.* in the county of Somerset, and no more; that the judgment remained unsatisfied, and the said sum of

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10,750*l.* 1*s.* 2*d.* was still due and owing thereon to the plaintiffs; that, since the judgment was obtained and the executions issued, many inquiries had been made of persons likely to be informed on the subject, and particularly of the secretary of the company, as to whether the company had any property or effects to satisfy the judgment, or any part thereof, and from such inquiries the deponent believed that they had none; that, upon inspection of the register, it appeared that there were seventy-six shareholders only who had bonâ fide subscribed for shares, and they had taken only 692 out of the 20,000 authorized to be issued, and that such shares taken were of the value of 17,310*l.* when all the calls were paid, but that of this about 6700*l.* had already been paid, leaving 10,610*l.* still unpaid, some of the shareholders, however, for various reasons repudiating their liability; that the deponent had been informed and believed that in many instances the company had not paid for the land taken by them for the purposes of the railway and proceedings were pending against them in several cases to enforce payment of the purchase-money; that, from the above facts, the deponent believed that the Devon and Somerset Railway Company were hopelessly and irretrievably insolvent, and that the only means the plaintiffs had of obtaining satisfaction of any portion of the said judgment against the company was by proceeding against the individual shareholders thereof; that all due diligence and means had been used to obtain satisfaction of the judgment from the company by issuing executions against them and otherwise, and the deponent verily believed that the company had not at the date of the judgment, nor at any time since had they had, any land, chattels, goods, properties, or effects whereon the amount of the judgment, or any part thereof, could be levied, except the lands mentioned in the returns to the said writs of elegit; that it appeared from the register of shareholders kept by the company under the statutes in that behalf that Lord Poltimore was the holder of two hundred shares in the said company, and that the whole amount of the said shares had not been paid up, but that there remained to be paid on and in respect of each of such shares the sum of 15*l.* towards the capital of the company; and that Lord Poltimore was personally served with the notice required by the statute.

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Mellish, Q.C., and *F. M. White*, shewed cause, upon affidavits which stated that search had been made at the proper office, and no record appeared of the return of the two writs of fi. fa. issued against the company. This rule is founded upon the 36th section of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), which enacts that, if any execution shall have been issued against the property or effects of the company, and there cannot be found sufficient whereon to levy such execution, then such execution (by sci. fa., according to the practice of the courts) may be issued against any of the shareholders, to the extent of their shares respectively in the capital of the company not then paid up. But, as no record appears of the return of the writs of fi. fa. against the company, this application is premature. No transfer made after the return of nulla bona can relieve a shareholder: *Nixon* v. *Green* (1); *Nixon* v. *Brownlow* (2); both of which cases were affirmed on appeal. (3) Alderson, B., in *Nixon* v. *Green* (4), after referring to the words of the section, and stating who are the persons against whom execution may issue, says: "But, in order that no injustice may be done, and that it may be ascertained who those persons are, notice must be given, so that the persons against whom proceedings are taken may have an opportunity of shewing that they were not shareholders *at the time of the return of nulla bona*. The object of requiring notice is merely to do justice to the class who are sought to be charged as shareholders at the time of the return of nulla bona. Any other construction would lead to an evasion of the act." That shews that the writs must be returned and the returns filed.

[WILLES, J. I do not think Alderson, B., meant to say that it is necessary that the return should have been filed.

Keane, Q.C. The writs have been returned in the usual way to the attorneys who issued them, with the sheriff's return indorsed thereon: and they are now in court.]

The return operates nothing until it is filed. Until then there could be no action against the sheriff for a false return. Before it will allow process to issue against a shareholder, the Court must

(1) 11 Ex. 550; 25 L. J. (Ex.) 209.
(2) 2 H. & N. 455; 27 L. J. (Ex.) 509.
(3) 3 H. & N. 686; 27 L. J. (Ex.) 509.
(4) 11 Ex. 554.

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be satisfied that all means of obtaining satisfaction from the company have been exhausted.

[WILLES, J. Even the return of nulla bona will not satisfy the Court. It must be shewn that reasonable efforts have been made to discover property of the company which could be made available to satisfy the judgment. The cases referred to raise a very nice question, and one that should properly be raised by plea to the scire facias.]

The proper course would be to order the plaintiffs now to file the returns to the writs of fi. fa., leaving them to apply for a sci. fa. afterwards. On reference to the indorsements on the back of the writs, it appears that the returns are not even dated.

Keane, Q.C., who appeared with *Bridge*, in support of the rule, tendered an affidavit of a clerk to the plaintiffs' attorneys, in which it was sworn that the writs were returned on the 15th of August last.

WILLES, J. The writs are now in Court, and will remain there. We must assume that the returns were made at the time stated in the affidavit. That being so, the sci. fa. will issue in each case. But, with a view to the preventing of needless expense, we would suggest that the parties should consent to an arrangement in the nature of a consolidation, the terms of which may be settled by counsel.

BYLES, J., and KEATING, J., concurred.

Rules absolute.

Keane, Q.C., afterwards intimated that in one case the rule nisi had not been served upon the shareholder personally, but upon Messrs. Vizard & Co., his attorneys, who had given an undertaking to appear thereto for him.

PER CURIAM. That will do, though in the case of the notice personal service is required.

Attorneys for plaintiffs: *Bircham, Dalrymple, & Co.*
Attorneys for defendants: *Vizard, Crowder, Anstie, & Young.*
Attorneys for Lord Poltimore: *Randall & Angier.*

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Nov. 8.

ELLSTON *v.* DEACON.

Partnership—Bill of Exchange—Acceptance by one Partner for a Sum which includes his private Debt—Amendment of Declaration, by adding a Count for the Consideration.

To an action on a bill of exchange the defendant pleaded that he did not accept, and proved that the bill was accepted by his partner in the name of the firm, and included a private debt due from the partner, as well as a debt due from the firm. The defendant had given the partner no authority to accept in the name of the firm for his private debt:—

Quære, whether the plea was proved?

In such a case, the Court amended the declaration by adding a count for the consideration, and directed a verdict to be entered for the sum really due from the firm, upon terms.

THIS was an action upon a bill of exchange for 150*l.* 10*s.*, alleged to have been drawn upon and accepted by the defendant on the 14th of December, 1865, payable two months after date. The declaration consisted merely of a count upon the bill.

The defendant pleaded that he did not accept, whereupon issue was joined.

The cause was tried before Byles, J., at the sittings for Westminster, in Trinity Term last. It appeared that the defendant and one Green had carried on the business of builders in partnership, and that the bill in question was drawn upon the firm and accepted by Green, "F. H. Green & E. Deacon," but that 6*l.* 5*s.* 5½*d.* of the amount was for goods supplied to Green before the commencement of the partnership.

It was thereupon objected that, as Green had at all events no authority to accept in the partnership name for the 6*l.* 5*s.* 5½*d.*, and the bill was not divisible, there was a total want of authority.

The learned judge yielded to the objection, and nonsuited the plaintiff, refusing to allow him to amend by adding a count for the consideration: but he reserved leave to the plaintiff to move to enter a verdict for 144*l.* 4*s.* 6½*d.*, if the Court should be of opinion that there was authority to accept pro tanto, or that the amendment ought to have been made.

Wills, in Trinity Term, obtained a rule to shew cause why the nonsuit should not be set aside and the declaration amended by

adding a count on the consideration for the bill; and why a verdict should not be entered for the plaintiff for 144*l.* 4*s.* 6½*d.*, either in respect of such added count or on the declaration as it stood, on the grounds that a supply of goods to that amount was proved for which the defendant was responsible, and that the acceptance of the bill was within the partnership authority to the extent of that sum.

C. H. Hopwood shewed cause. He submitted that the unauthorized acceptance by Green of a bill for a sum which included his own private debt was a fraud upon Deacon, and altogether vitiated the instrument: referring to *Robinson* v. *Bland* (1); *Wells* v. *Masterman* (2); *Shirreff* v. *Wilks* (3); *Painter* v. *Abel* (4); *Baines* v. *Ewing*. (5)

[WILLES, J. Not one of these cases is exactly in point. There is no case that I am aware of, in which it has been held, that, where there is a general authority to accept, and a bill is given for more than is due, there being no fraud, the holder of the bill is disentitled to sue upon it at all events to the extent to which there is authority. Suppose the firm has the acceptance of a third person, and one of the partners indorses it over to a creditor for a debt partly due from the firm and partly from himself alone, is there any doubt that the indorsee might recover against the firm to the extent of the debt of the firm? All difficulty, however, may be got rid of by adding a count for the consideration, which we clearly have power to do. The only question is upon what terms that should be done.]

If a count for the consideration had been added at the trial, the defendant would have pleaded the non-joinder of Green; and then this difficulty would have arisen, viz. that there is no power to amend by adding a defendant: *Garrard* v. *Guibilei*. (6)

[BYLES, J. It is true that there must be one defendant as to part of the debt and another as to the other part, in order to enable the plaintiff to recover: but I see no objection to the verdict being taken for the amount of goods supplied to the firm.]

Wills, contrà, was not called upon.

(1) 2 Burr. 1082.
(2) 2 Esp. 731.
(3) 1 East, 48.
(4) 2 H. & C. 113; 33 L. J. (Ex.) 60.
(5) Law Rep. 1 Ex. 320.
(6) 11 C. B. (N.S.) 616; 31 L. J. (C.P.) 131: in error, 13 C. B. (N.S.) 832; 31 L. J. (C.P.) 270.

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ERLE, C.J. Without deciding the point of law, I think we have sufficient power under the Common Law Procedure Acts to make such an amendment as will advance the justice of the case: and I think we ought to exercise that power here. There is a clear debt due from the defendant for goods sold and delivered to the extent of 144*l.* 4*s.* 6½*d.* Justice will therefore be done if we order that a verdict be entered for the plaintiff for that sum and the costs of the action only; but that the defendant's costs of this rule be deducted therefrom.

WILLES, J., BYLES, J., and KEATING, J., concurred.

Rule absolute accordingly.

Attorneys for plaintiff: *Drew & Wilkinson.*
Attorneys for defendant: *Ody & Adams.*

Nov. 9.

KITCHIN AND ANOTHER *v.* HAWKINS.

Bankruptcy Act, 1861 (24 & 25 *Vict.* c. 134), *s.* 192—*Composition Deed—Acceptance of Composition under a Deed afterwards held to be void—Receipt of Money under a Mistake of Law.*

The defendant called a meeting of his creditors and proposed a composition of 10*s.* in the pound, payable by two instalments, and a deed was prepared in supposed compliance with s. 192 of the Bankruptcy Act, 1861. The plaintiffs, who were creditors, declined to assent; but, subsequently, on being informed by the defendant that the deed had been executed by the required number of creditors, and had been registered, and the amount of the instalments having been remitted to them, they took the money and said nothing. The deed was afterwards decided to be void for want of a strict compliance with the provisions of the statute:—

Held, that the plaintiffs were precluded from suing the defendant for the balance of their debt; as the mistake, if any, under which they had received the instalments, was one of law and not of fact.

THIS was an action upon a bill of exchange for 197*l.* 19*s.* drawn by the plaintiffs on the 16th of January, 1864, upon the defendant, payable to the plaintiffs' order four months after date; with a count for the consideration.

The defendant pleaded, first, a plea setting up an indenture dated the 11th of March, 1864, and made between the several per-

sons or parties whose names and seals were subscribed and affixed in the schedule thereunder written (being creditors in their own rights solely, or in co-partnership with others, of the defendant [describing him] executing, assenting to, or approving of the same indenture), of the first part, the defendant of the second part, and Benjamin Wade and John Crossley of the third part, with the usual averments shewing it to be a deed of composition under the 192nd section of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134).

Secondly, as to 197*l.* 19*s.*, parcel of the moneys claimed, that the defendant was indebted to the plaintiffs in that amount as alleged, and that he was indebted to divers other persons respectively; that it was thereupon mutually agreed by and between the defendant and the plaintiffs and the said other persons, that the defendant should pay to the plaintiffs and the said other persons respectively, and that the plaintiffs and the said other persons should accept from the defendant, a composition of 10*s.* in the pound on their respective debts, in full satisfaction and discharge of their said respective debts; and that the defendant afterwards, in pursuance of the said agreement, and before the commencement of the action, paid to the plaintiffs, and the plaintiffs accepted and received from the defendant, the said composition on the said sum of 197*l.* 19*s.*, in full satisfaction and discharge of the said debt from the defendant to the plaintiffs.

Thirdly, to the second count, except as to 197*l.* 19*s.*, never indebted.

The plaintiffs joined issue on each of the above pleas. They also demurred to the first plea; but the demurrer was not argued.

The cause was tried before Erle, C.J., at the sittings in London after last Easter Term. The defendant had carried on the business of a corn and seed merchant at Belper, in the county of Derby. In February, 1864, being unable to meet his engagements, a meeting of his creditors was held, at which it was proposed to pay them a composition of 10*s.* in the pound, by two instalments of 5*s.* each, the first instalment to be paid on or before the 15th of March, and the second (with security) on the 23rd of August. The plaintiffs were creditors for 197*l.* 19*s.*, the amount of an overdue bill of exchange, and attended the meeting by their traveller, who

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however took no part in the proceedings. A deed of composition was afterwards prepared, dated the 11th of March, 1864, which was duly registered on the 6th of April.

The sureties for the second instalment having been proposed and approved, the plaintiffs were on the 3rd of March applied to for their assent to the deed. On the 15th Messrs. Linklaters & Hackwood, the plaintiffs' attorneys, wrote to the defendant's attorney, as follows :—

"*Re W. F. Hawkins.*

"The following creditors are, we believe, acting in unison in this matter, namely:—The Derby and Derbyshire Bank, Messrs. Thompson & Frankish, Mr. Norman, Messrs. Kitchin & Co., Mr. Kitchin, and Messrs. Thornton, Kennedy, & Co.; and, before they are prepared to assent to the proposed composition, they require to have an examination made into Mr. Hawkins's affairs. Have the goodness to let us know when and where the books can be inspected, so that the accountant whom the creditors may instruct may make his arrangements for their examination. Our clients will not assent to the composition till this investigation has been made."

To this letter the defendant's attorney replied on the 17th of March :—

"*Re Hawkins.*

"In reply to yours of the 15th instant, I beg to say that *the statutory majority of the creditors for this composition has been secured, and the assents of your clients are not needed to make it a binding arrangement.* Nevertheless, I of course prefer that they should assent; and the first instalment of composition is ready for them at any moment. I shall, therefore, hope to receive their assents without delay. Your requirement of an investigation of Mr. Hawkins's affairs at this late period somewhat surprises me. It is nearly a month since the creditors' meeting was called; and all the parties you name either did not attend, or attended and did not dissent from what was agreed to, viz. the composition. Mr. Hawkins has been subjected to personal examination before the meeting, at the meeting, and subsequent thereto; and to re-open the matter at this stage seems neither useful nor proper."

On the 18th of March, Messrs. Linklaters & Co. again wrote to the defendant's attorney, as follows:—

"*Re Hawkins.*

"Are we to understand by your letter that an opportunity for investigation is to be denied to the creditors we represent? We shall be glad to know this definitely, before taking other measures, which our clients are quite prepared for. You must be aware that, even if the deed be completely registered and binding, the act of 1861 gives the creditors the power of investigation they require. It seems a pity to drive them to the court on the subject, and we shall therefore wait a return of post, in the hope that our further interference will be unnecessary."

To this the defendant's attorney replied on the 19th:—

"*Re Hawkins.*

"If your clients are acting *bonâ fide*, and have any specific charges to make, let me know what they are (giving reasonable particulars as to dates, sums, or otherwise), and I will answer them, or advise my client to submit to examination. But my belief is, that your clients are simply desirous of making a fishing examination; and to that you cannot expect me to accede at this stage, nor shall I; nor would the court direct it. Rather than be subjected to such a thing, I should advise my client to prefer an investigation under the control of the court. He would at least have fair play, and justice in the matter of costs."

On the 21st of April, the defendant sent the plaintiffs a draft for the first instalment of the composition, inclosed in a letter, as follows:—

"Gentlemen,—The deed of composition for securing my creditors 10*s.* in the pound upon their debts *is now completed, and has been registered, thus binding all the creditors.* You have not favoured my solicitor with your concurrence; but I wish you to have the same dividend as the rest, and always did intend to deal fairly by all. I therefore inclose you a banker's draft for 49*l.* 9*s.* 9*d.*, the amount of first half of the composition due to you on your debt of 197*l.* 19*s.*, and shall be obliged if you will sign and return to me the inclosed receipt."

The plaintiffs did not acknowledge the receipt of the above; but

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they presented the draft, and received and kept the money. On the 22nd of August the defendant remitted to the plaintiffs the amount of the second instalment, in a letter, as follows:—

"Gentlemen,—Inclosed I beg to hand you the amount due to you under deed of composition (second instalment). Agent of the Bank of England, Leeds, 34*l.* 19*s.* 5*d.*, dated August 11, 1864, drawn by Cooper & Co., payable to Charles C. Disney, Esq.; my cheque on Cromptons, Derby, amount 14*l.* 10*s.* 4*d.*; making together 49*l.* 9*s.* 9*d.* Please acknowledge receipt of same per return."

The plaintiffs received and kept this money likewise without any acknowledgment; and, having probably learnt in the meantime that the deed of arrangement had been decided by the Court of Exchequer in a case of *Chesterfield & Midland Silkstone Colliery Company* v. *Hawkins* (1), upon the authority of *Ex parte Cockburn* (2), to be void as against non-assenting creditors, they on the 23rd of February, 1865, demanded of the defendant the remainder of their debt.

On the part of the defendant it was submitted that, assuming the deed not to have been a valid deed under the Bankruptcy Act, 1861, he was at all events entitled to a verdict on the second plea, the plaintiffs being under the circumstances estopped from denying that the money which they received was received by them as and for a composition.

For the plaintiffs, it was contended that, the money having been received by them upon the faith of the defendant's assertion that the deed was valid and binding upon all his creditors, it was received under a mistake of fact, and consequently that they were entitled to treat the payments as having been merely made on account.

His Lordship directed a verdict for the defendant, reserving leave to the plaintiffs to move to enter a verdict for them for the balance of their debt, if, upon the facts, the Court should be of opinion that the pleas (subject to any amendment) afforded no answer to the action.

J. Brown, Q.C., accordingly, in Trinity Term last, obtained a rule nisi to enter a verdict for the plaintiffs, on the ground that the evidence given at the trial did not support either the first or the

(1) 3 H. & C. 677; 34 L. J. (Ex.) 121. (2) 33 L. J. (Bkr.) 17.

second plea, and that the evidence did not shew any legal or equitable defence to the action.

Hayes, Serjt., and *C. J. Butt*, shewed cause. The plaintiffs and others of the defendant's creditors having accepted the composition upon the terms of the arrangement communicated to them, it is not competent to them now to say that they received it merely as part payment.

[BYLES, J. Which plea do you rely on?]

The second, at all events as affording an equitable defence. The acceptance of the money under the circumstances operated, at least in equity, precisely as if the plaintiffs had executed the deed: *Jolly* v. *Wallis* (1); *Sadler* v. *Jackson* (2); *Cheesebrough* v. *Wright*. (3) The case of *Ex parte Cockburn* (4) was decided on the 13th of April, 1864; the first instalment of the composition was paid to the plaintiffs on the 21st of April, and the second on the 22nd of August; and both were retained. The plaintiffs had abundant opportunity of seeing the deed. The intimation that it had been registered was conveyed to them in the defendant's letter of the 21st of April, 1864; and they made no objection until the 23rd of February, 1865.

[BYLES, J. There was no misrepresentation in fact by the defendant, and no mistake of fact on the plaintiffs' part, but a mere mistake of law.]

The second plea, it is submitted, is absolutely proved as it stands; but at all events if turned into an equitable plea. There was a meeting of the defendant's creditors, and a resolution come to at that meeting for a composition upon terms which were subsequently embodied in a deed, and the plaintiffs and other creditors took the composition. Assuming the deed to be bad as against non-assenting creditors, it does not follow that it may not be binding upon those who have assented thereto by their acceptance of the composition under it. No fraud is suggested here. The utmost that can be said is, that the defendant misrepresented the legal effect of the deed, which cannot affect the composition: *Lewis* v. *Jones*. (5)

(1) 3 Esp. 227.
(2) 15 Ves. 52.
(3) 28 Beav. 283.
(4) 33 L. J. (Bkr.) 17.
(5) 4 B. & C. 506; 6 D. & R. 567.

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J. Brown, Q.C., and *Lanyon*, in support of the rule. The deed having been held void, there is an end of all question upon the first plea. It may be conceded that if two or more creditors agree with their debtor to accept a composition amounting to less than their entire demand, each acting on the faith of the engagement of the others, the agreement is binding upon them: see the notes to *Cumber* v. *Wane*. (1) But the question is, whether there has been any such agreement here. There is nothing in the evidence or in the correspondence to shew it. On the contrary, there is distinct evidence that the plaintiffs throughout declined to assent to the proposed composition. The defendant's letter, inclosing the first instalment, does not ask the plaintiffs to assent: it states, no doubt erroneously, that the deed is a valid deed under the 192nd section of the Bankruptcy Act, 1861, and therefore that the plaintiffs are bound by it. Under these circumstances, no court would hold the plaintiffs bound by their acceptance of the money. The rule as to the appropriation of payments was considered recently in *Croft* v. *Lumley* (2), where all the authorities, including *Doe* d. *Cheney* v. *Batten* (3), *Hardman* v. *Bellhouse* (4), and *Webb* v. *Weatherby* (5), are referred to. The result shews that in a case like this it is the intention of the recipient which determines the appropriation. The money here was accepted upon the faith of the statement contained in the attorney's letter of the 17th of April. The observations of Willes, J., in *Brooks* v. *Jennings* (6), are strong to shew that the acceptance was conditional only upon the deed turning out to be a valid and binding deed.

[WILLES, J. What is there said is rather against the argument.]

ERLE, C.J. I feel much indebted to Mr. Lanyon for having brought the authorities so clearly to our attention. But it appears to me that the question we have to determine is rather one of fact than of law. The defendant was indebted to the plaintiffs and to several other persons, and called a meeting of his creditors, at which meeting it was proposed that a composition deed should be

(1) 1 Str. 426; 1 Smith's L. C. 5th ed. 288, 294.
(2) 6 H. L. C. 672. 4 Jur. N.S. 903
(3) Cowp. 243.
(4) 9 M. & W. 596.
(5) 1 Bing. N. C. 502; 1 Scott, 477.
(6) Law Rep. 1 C. P. 476, 481. 12 Jur. N.S. 341, 342.

prepared, which was undoubtedly intended to be a deed under the Bankruptcy Act, 1861. After the decision pronounced by the Court of Exchequer, we must assume that that deed was not valid so as to bind non-assenting creditors. Still, a creditor may be bound by his acceptance of the composition though the deed be not in strict compliance with the statute. That the defendant intended the payments he made as payments of a composition is clear from his letters of the 21st of April and 22nd of August. The plaintiffs undoubtedly had a right at the time to accept the money on those terms, and to say that they would carry the payments to the account of their debt, and wait to ascertain whether the deed was good or not. But there is no doubt that the remittances were made as composition; and the plaintiffs kept the money, and said nothing. And it was not until February in the following year, when the deed had been decided to be void, that they repudiated the transaction and claimed the balance. I think they had no right to do so. The money cannot be said to have been received under a mistake of fact: the parties were mistaken as to the legal effect of the deed. The plaintiffs might have taken the course pointed out by Willes, J., in *Brooks* v. *Jennings*. (1) Indeed, it was their bounden duty to do so; for, we all know that these compositions are frequently derived from funds supplied by the debtor's friends. If the plaintiffs did not choose to accept the money tendered as a composition, they ought to have given the defendant an opportunity of taking it back. The plaintiffs and other creditors of the defendant having accepted a composition on their respective debts, I think the plaintiffs are, quite independently of the statute, precluded from suing for the residue of their debt.

WILLES, J. I am of the same opinion. If the statute making composition deeds binding upon the general body of creditors in certain circumstances were out of the question, it could hardly be deemed that there was an agreement between the defendant and the plaintiffs and the other creditors of the defendant that all the creditors should accept a composition of 10*s.* in the pound in satisfaction and discharge of their respective debts. The ordinary course was pursued. A meeting was called; and a composition

(1) Law Rep. 1 C. P. 476, 481. 12 Jur. N.S. 346, 342

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was proposed, and assented to by the majority of the creditors. If the plaintiffs had insisted upon being paid their demand in full, the defendant's course would have been clear: he must have become bankrupt, in order to prevent a preference which would have been a fraud upon the rest of the creditors. He was therefore entitled to, or might fairly expect to receive, an answer from a creditor who had not assented in the first instance, as to whether or not he agreed with the general body of creditors, when the composition was tendered to him. A deed of composition was prepared, which until the decision of Lord Westbury in *Ex parte Cockburn* (1), and of the Court of Exchequer in *Chesterfield & Midland Silkstone Colliery Company* v. *Hawkins* (2), came to the knowledge of the parties, was supposed to comply with all the provisions of the 192nd section of the Bankruptcy Act, 1861. The defendant in the meantime paid the two instalments of the composition, intimating to the plaintiffs at the time that the money was paid as the composition agreed on by the deed. The plaintiffs took the money and returned no answer; and six months after the second payment was made, they insisted upon being paid the rest. The obvious justice of the case is, that, having accepted a composition in the ordinary way, the plaintiffs should be bound by it. Then, does the statute make any difference? I think not. It only shews that the parties were under a wrong impression when the money was paid and received as a composition. A mistake of fact might have avoided the transaction: but here was no mistake of fact, but only a mistake upon a nice point of law. The just conclusion from the facts is, that the payment and acceptance of the money, even under the erroneous impression that the deed was valid, discharged the defendant.

BYLES, J. I am of the same opinion. By arrangement here we are to be judges both of law and fact. The law seems to be clear, from the opinions of Lord Kenyon in *Jolly* v. *Wallis* (3), of Lord Eldon in *Sadler* v. *Jackson* (4), and of the present Master of the Rolls in *Cheesebrough* v. *Wright* (5), that, where a creditor receives a composition, he is bound by it though he has not signed the

(1) 33 L. J. (Bkr.) 17. 10 Jur. (N.S.) 573.
(2) 3 H. & C. 677; 34 L. J. (Ex.) 121.
(3) 3 Esp. 227.
(4) 15 Ves. 52.
(5) 28 Beav. 283.

deed. The plaintiffs, though they did not originally assent to the composition, have received the two instalments. It may be that they only intended to receive the money as part payments on account of their debt. But, what was the representation which they made to the defendant? When the defendant said "I inclose you this money as the composition," the plaintiffs took it and said nothing. That, in my judgment, amounted to a representation that they intended to come in under the deed. Their acts, or rather their omissions, shewed that they meant the defendant so to understand. There is no pretence for saying that there has been any mistake of fact. There was no doubt a mutual mistake of law,—assuming the decision of the Court of Exchequer as to the legal effect of the deed in question to be right. Wherever there is an intention expressed by the payer that the money is paid upon a particular account, and the payee receives it under a different intention, it is the duty of the latter to give the former an opportunity to retract. That is no new rule. It was the rule of the civil law,—"Dum in re agendâ hoc fiat; ut vel creditori liberum sit non accipere vel debitori non dare, si alio nomine exsolutum quis eorum velit; cæterum postea non permittitur." (1) What is intended must be said at the time. It seems to me, therefore, that both the law and the facts are against the plaintiffs in this case.

KEATING, J. I am of the same opinion. The evidence to my mind clearly shews that the plaintiffs did receive the two payments in April and August as payments on account of the composition. They did not, as according to the suggestion in *Brooks* v. *Jennings* (2) they might have done, take the money offered, but with an intimation that they received it conditionally only. On the contrary, they by their conduct induced the defendant to believe that they accepted it as payment of the composition. Both instalments were received in silence: and it was not until ten months after the receipt of the first instalment that the defendants intimated their dissent. I think it is impossible to arrive at any other conclusion from the facts than that the plaintiffs are by their con-

(1) Dig. 46. 3. 2, 3.
(2) Law Rep. 1 C. P. 476.

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duct precluded from now saying that the money was received otherwise than as a composition.

Rule discharged.

Attorneys for plaintiffs: *Linklaters & Hackwood.*
Attorney for defendant: *F. H. Jeanneret, for J. G. Jackson, Belper.*

Nov. 24.

FRITH AND OTHERS *v.* GUPPY AND ANOTHER.

Foreign Attachment—Vexatiously suing in the Mayor's Court, London, pending an Action in this Court for the same Cause—Staying Proceedings.

Two actions were brought in this court, one by A., a merchant at Naples, against B., the other by B. against A., for alleged breaches of two several contracts for cargoes of timber to be shipped at Moulmein and to be delivered at Genoa. In the first action A. recovered judgment for 3801*l.* 13*s.* 4*d.*, and on the 14th of November, 1866, the amount was paid to his attorneys, who carried on business in the City of London; and on the same day an attachment from the Mayor's Court was served upon A.'s attorneys in an action brought in that court at the suit of B. for the same cause as that for which the action of B. against A. was brought in this court:—

The Court ordered that the proceedings in the action in this court be stayed, unless B. elected within a week to abandon the proceedings in the Mayor's Court, —deeming the proceedings in the Mayor's Court to be unfounded and vexatious.

THIS was an action brought by the plaintiffs, Messrs. Frith, Sands, & Co., against the defendants, who are merchants at Naples, to recover damages for an alleged breach by the latter of a contract entered into between them and the plaintiffs on the 7th of February, 1862, and the plaintiffs sought to recover compensation for the defendants' refusal to accept a cargo of teak shipped for them by the plaintiffs from Moulmein in February, 1864, to be delivered at Genoa. The plaintiffs claimed 4187*l.* 19*s.* 11*d.*, being the difference between the contract price of the timber and interest (19,826*l.* 12*s.* 4*d.*) and the net proceeds of the cargo, sold in February, 1865, viz. 15,638*l.* 12*s.* 5*d.* The action was commenced on the 1st of April, 1865.

On the 1st of February, 1865, Messrs. Guppy & Co., the now defendants, had brought an action against Messrs. Frith, Sands, & Co., the now plaintiffs, to recover damages for breach of a contract, dated the 12th of February, 1862, for the sale by Messrs. Frith,

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Sands, & Co. to Messrs. Guppy & Co. of a cargo of teak by the *Orion*, which was delivered at Genoa in May, 1862, and was found to be greatly inferior to the quality contracted for; and, after a delay of about five years and a half, Messrs. Guppy & Co. obtained (under the award of an arbitrator) judgment in that action for 3801*l.* 13*s.* 4*d.*, damages and costs; and on the 14th of November instant, Messrs. Freshfields & Newman, the attorneys for Messrs. Guppy & Co., received from Messrs. Cotterill & Sons, the attorneys for Messrs. Frith, Sands, & Co., a cheque for that sum.

Within an hour after such payment Messrs. Freshfields & Co. were served with notice of attachment from the Lord Mayor's Court, London, in a plea of debt against Messrs. Guppy & Co., at the suit of Messrs. Frith & Co., the debt sworn to being 3439*l.* 16*s.* 1*d.*

Upon affidavits stating these facts, and also stating that the action so brought by the plaintiffs against the defendants in the Lord Mayor's Court was brought for the same claim, and was founded upon identically the same matter, and was in effect to recover identically the same sum as was sought to be recovered in this action, and was brought vexatiously and without any proper occasion, and merely for the purpose of embarrassing the defendants,

Watkin Williams moved for a rule calling upon the plaintiffs to shew cause why all further proceedings in this cause should not be stayed, unless the plaintiffs should within a week elect to abandon the action brought by them against the defendants in the Lord Mayor's Court and all proceedings therein.

[WILLES, J. The cause of action not arising within the City of London, why not apply for a prohibition?]

The present was thought the more convenient remedy, especially after the experience of the late case in the Exchequer. (1)

The rule having been granted,

Sir G. Honyman, Q.C., and *Cohen*, shewed cause. (2) The

(1) *Cox* v. *Mayor of London*, 1 H. & C. 338; 32 L. J. (Ex.) 64; on error, 2 H. & C. 401; 32 L. J. (Ex.) 282.

(2) The affidavits in opposition to the rule shewed that the contracts in both actions had been made through a broker in London; that the plaintiffs' attorneys, in the course they had pursued, had acted under the bonâ fide impression that their clients had a good cause of action to the extent sworn to; and that, having failed in an attempt to

W. R. 9 Jur. N. S. 542.

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plaintiffs had an undoubted right to attach the money in the hands of Messrs. Freshfield. It may be that the proceedings in the Mayor's Court are worthless and assailable by prohibition. But the question is, whether that is any ground for staying the proceedings in this action, which are perfectly regular. There are authorities to shew that it is competent to a plaintiff to adopt the two courses concurrently. In Com. Dig., Attachment (B.), it is said, that, "if a man sue for a debt in C. B., pending this suit he may affirm his plaint in London for the same debt, and make an attachment of a debt due from another to the defendant,"—citing *Leuknor* v. *Huntly*. (1) A similar application to the present was refused in *Denton* v. *Maitland*. (2) Williams, J., there says: "The two proceedings are not ad idem. It is not a case of the plaintiff suing the defendants in this court and in the Mayor's Court for the same cause of action; but the attachment is a perfectly independent proceeding, and out of the common course." And in a note to that case another case of *Garbett* v. *Adams* (3) is cited (ex relatione Dowdeswell), where a summons was taken out to stay proceedings in the action on the same ground as in the principal case, which was opposed by Dowdeswell, and discharged by Cresswell, J., on the ground that the pendency of proceedings in the inferior court was no reason for staying the action, and also because the plaintiff in the action could not have any remedy against the fund in the hands of the bankers. In the notes to *Turbill's Case* (4) it is said that "a defendant may be arrested by process out of the courts at Westminster after having put in bail or surrendered in discharge of a foreign attachment in the city court for the same cause;" for which is cited *Wood* v. *Thomson*. (5) This is not like the case of a plaintiff bringing two actions, when he may attain the same result in one. Assuming that the Court has power to do what is asked by this rule, it is clearly an application to their equitable discretion; and it will not

get the amount of damages in the former action paid into court to abide the result of this action, the only mode of securing the fruits of any judgment they might obtain in this action (the defendants residing out of the jurisdiction) was by means of process of attachment.

(1) Cro. Eliz. 593, 712.
(2) 15 L. J. (Q.B.) 332.
(3) 15 L. J. (Q.B.) at p. 333.
(4) 1 Wms. Saund. 67 *b*, n. (*h*)
(5) 5 Taunt. 851; 1 Marsh. 395.

be granted so as to work injustice to the plaintiffs. The rule calls upon them to elect to proceed here or in the Lord Mayor's Court. Suppose they elect to proceed in the inferior court, they would probably be met by a motion for a prohibition, and they would be obliged to pay all the costs of the present action. It might perhaps be right to stay the proceedings here until those in the Lord Mayor's Court are concluded; or perhaps the justice of the case would be met by making it a condition that the defendants should not set up the want of jurisdiction in the inferior court, or, if the plaintiffs elect to proceed with this action, that they should give security. It could be no vexation to commence the proceedings in the Lord Mayor's Court according to the ordinary course of practice there, viz. by affidavit of debt.

[WILLES, J. In a case of unliquidated damages? The defendants have no opportunity of answering the affidavit in the Mayor's Court: they could only surrender themselves or give bail to pay. We have had to consider this matter very much in the case pending in the House of Lords; and the result is a conviction on my mind that the plaintiffs' proceeding in the Mayor's Court is unfounded and vexatious. The legislature in passing the Common Law Procedure Act, 1854, advisedly abstained from extending the foreign attachment to cases where judgment had not been obtained.]

Watkin Williams, in support of the rule, was not called upon.

WILLES, J. I think this rule should be made absolute. It is not necessary to lay down any rule,—and as at present advised, I think there is no such rule of practice,—that, where a second action is brought pending a former action for the same cause, the proceedings in the second action should be stayed. I do not found my judgment in this case upon any such consideration as that, but upon the fact that the proceedings in the Lord Mayor's Court are vexatious. Those proceedings are taken against a litigant before the Court; and it is within the equitable jurisdiction of the Court to stay the proceedings therein, where a double proceeding is pending vexatiously. I think the plaintiffs ought to be put to their election to go on with the action in the Mayor's Court, or to

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be satisfied to proceed with that first instituted here. Messrs. Guppy & Co. brought an action against Messrs. Frith & Co., and have recovered in that action the amount due to them, and have obtained a judgment under which the money has been paid for them into the hands of Messrs. Freshfields & Newman, their attorneys. If Messrs. Freshfields & Newman had chanced to carry on their business in Parliament Street or elsewhere out of the city and liberties of London, the money so paid to them would have found its way in due course into the pockets of their clients. But, as they happen to carry on their business in the city, they were exposed to be proceeded against by process of garnishment in the Mayor's Court. Accordingly, Messrs. Frith & Co., having a cross claim against Messrs. Guppy & Co., in respect of which they had not obtained judgment, and which claim was litigated and denied by Messrs. Guppy & Co., brought a plaint against them in the Mayor's Court, and issued an attachment in order to intercept the money in the hands of Messrs. Freshfields & Newman. If that were a well founded proceeding, if the Mayor's Court had jurisdiction in the matter, or if there was any doubt upon the point, I should have desired time to consider whether the mere bringing of a second action was any ground for staying the proceedings in the first action. But I am quite satisfied that the proceedings in the Mayor's Court are not well founded, and that, if carried on to their ordinary ending, they must terminate in favour of Messrs. Guppy & Co. It is laid down in Comyns's Digest, London (B.), that the jurisdiction is confined to the city and its liberties; and that is in accordance with what is laid down by Lord Holt in *Mendyke* v. *Stint.* (1) Again, in the cases of *Wadsworth* v. *The Queen of Spain* and *De Haber* v. *The Queen of Portugal* (2), Lord Campbell, in delivering the judgment of the Court, says: "The circumstance that the cause of action, if there were any, arose out of the jurisdiction of the Lord Mayor's Court, need not be relied upon. Nevertheless, after the strong assertions at the Bar that this is immaterial where the defendant does not appear, we think it right to say that, having examined the authorities, we entertain no doubt that the process of foreign attachment can only be duly resorted to where the cause of action arose

(1) 2 Mod. 272.

(2) 17 Q.B. 171; 20 L. J. (Q.B.) 488.

within the jurisdiction of the Court from which it issues." In *Cox* v. *The Mayor of London* (1) it was held that a custom of the city of London, on a plaint being entered in the Lord Mayor's Court, to attach a debt due to the defendant from a third person, upon his being found within the jurisdiction, though none of the parties are citizens or resident in the City, and neither the original debt nor that due from the garnishee accrued within the City, is void in law. That case was taken to the Exchequer Chamber, and the judgment was affirmed. (2) I am aware that the matter is now pending in the House of Lords, by whom certain questions were put to the judges: and, as I was one of the judges present at the argument, and have given much consideration to the question, I may say that I have found no authority at variance with those to which I have referred. We must, therefore, take it that the judgment of the Exchequer Chamber was right. The present action is brought for refusing to accept a cargo of teak, not only out of the jurisdiction of the Mayor's Court, but out of the kingdom. I cannot, therefore, doubt that the proceeding in the Mayor's Court is not a well founded proceeding. It is said that Messrs. Guppy & Co. are not injured, for that they may plead to the action in the Mayor's Court, and, if their defence is well founded, they will succeed. But that success would only be attained at the expense of much delay, and, possibly, some costs. And so early as Lord Coke's time, it was laid down that the terror of a suit is a damnification in law. It is further suggested that Messrs. Guppy & Co. may move for a prohibition. The answer to that is obvious. Why should they be put to all the difficulty of declaring in prohibition, and possibly also to two appeals before they arrive at justice, when relief is open to them by the more summary and less expensive course which they have been advised to adopt? These considerations satisfy my mind that the proceedings in the Mayor's Court are useless and vexatious. I disclaim imputing to Messrs. Frith & Co., or to their advisers, any desire to harass or oppress their opponents. But the effect of what they have done for the attainment of their object is in itself vexatious and oppressive. It is urged that the double proceeding may be an abuse of the process of

(1) 1 H. & C. 338; 32 L. J. (Ex.) 64. (2) 2 H. & C. 401; 32 L. J. (Ex.) 282.

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the Mayor's Court, but can be no abuse of the proceedings in this court. But I think it an abuse of both, and that the rule for putting the plaintiffs to their election must be made absolute.

KEATING, J. For the reasons given by my Brother Willes, I think the proceedings in the Mayor's Court are oppressive and vexatious, and that this rule should, therefore, be made absolute.

Rule absolute.

Attorneys for plaintiffs: *Cotterill & Sons.*
Attorneys for defendants: *Freshfields & Newman.*

Nov. 24.

MEYERSTEIN *v.* BARBER AND OTHERS.

Bill of Lading, Duration of Goods landed at a Sufferance-Wharf, with a "Stop" for Freight—Pledge—What a sufficient Possession to maintain Trover.

A bill of lading remains in force until there has been a *complete* delivery of the goods thereunder to a person having a right to receive them, and is not spent or exhausted by the landing and warehousing of them at a sufferance-wharf,—at all events so long as they are under stop for freight.

A. was indorsee of a bill of lading, drawn in a set of three, making cotton deliverable in London on payment of freight; the cotton had been lately landed, under an entry made by A., at a sufferance-wharf in the port of London, with a stop thereon for freight; on the 4th of March A. obtained from M. an advance of 2500*l.* on the deposit of *two* copies of the bill of lading, M. assuming the third to be in the hands of the master.

On the 6th of March, the stop for freight being then removed, A., who had in February instructed B., a broker, to take samples of the cotton and to offer it for sale, obtained from B. an advance of 2000*l.* on the deposit of the *third* copy of the bill of lading, which A. had fraudulently retained.

On the 11th of March, B., being informed of the prior advance by M., sent his copy of the bill of lading to the wharf, and procured the cotton to be transferred into his own name, and afterwards sold it and received the proceeds:—

Held, that the bill of lading, when deposited with M., retained its full force and effect; that there was therefore a valid pledge of the cotton to M.; and he could maintain an action against B., either for the proceeds of the sale, as money received to his use, or for a wrongful conversion of the cotton.

DECLARATION for money had and received, with a count for the conversion of certain bales of the plaintiff's cotton.

Pleas, never indebted and not guilty. Issue thereon.

At the trial before Erle, C.J., at the sittings in London, after last Trinity Term, the following facts appeared:—

In August, 1864, two hundred and seventy seven bales of cotton were shipped on board the *Acastus*, at Madras, by Messrs. De Suza & Co., pursuant to a contract with Messrs. Azémar & Co., merchants in London, under a bill of lading making it deliverable in London to the shippers or assigns, on payment of certain freight. Messrs. De Suza & Co. drew upon Azémar & Co. for the value, and got the bills discounted by the Chartered Bank of India, at Madras, handing over to the bank the bill of lading. Before the arrival of the cotton in London, Messrs. Azémar & Co. had transferred their business to one Abraham; and ultimately the bill of lading was indorsed to Abraham by De Suza & Co.

The *Acastus* arrived in London, with the cotton on board, on the 31st of January, 1865: and on the 1st or 2nd of February, Abraham made an entry at the Custom House, with a note that the cotton was to be delivered at Cotton's Wharf, a sufferance-wharf in the port of London, and it was accordingly landed there, the landing being completed by the 7th, and Abraham's name was entered in the wharfingers' books as the importer. Abraham employed Messrs. Barber & Co., the defendants, who were cotton brokers in London, to offer the cotton for sale, and on the 9th of February gave them a sampling order, under which samples were taken on the 11th.

On the 4th of March, Abraham applied to the plaintiff for an advance of 2500*l.* on the security of cotton per *Acastus*. The plaintiff, who had had former dealings with Azémar & Co., consented to advance the money, and Abraham procured the bill of lading from the Chartered Bank of India in London (to whom the bills of exchange with the bill of lading annexed had been remitted from Madras), and handed *one copy* (the bill of lading being drawn in a set of three) to the plaintiff, together with the invoice. The plaintiff asked for "the other copy," assuming that one would be in the master's hands; whereupon Abraham promised to send *it* to him, and did afterwards send him a *second* copy. *At this time the freight had not been paid, and the cotton lay at the wharf subject to a "stop" thereon for freight.*

On the 6th of March, Abraham applied to the defendants for an advance of 2000*l.* on the same cotton, handing them the *third* copy of

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the bill of lading, which he had fraudulently retained in his possession. The defendants advanced Abraham 1500*l.* on that day, and, on the 7th, finding that the stop for freight was then removed, gave him the other 500*l.*

On the 11th of March, the plaintiff for the first time learnt that the cotton had arrived, and that the defendants had been employed by Abraham to offer it for sale. He thereupon went to the defendants, and informed them of his prior advance, shewing them the two copies of the bill of lading which Abraham had deposited with him. On the same day, and *after that interview*, but (as one of the defendants swore at the trial) pursuant to prior instructions, a clerk of the defendants took the third copy of the bill of lading to Cotton's Wharf, and procured the cotton to be transferred to their names, and on the 13th obtained a warrant for it, and shortly afterwards sold it. The cotton realized more than the 2000*l.* advanced by the defendants. The surplus was by arrangement handed over to the plaintiff, and this action was brought to recover the balance of the plaintiff's advance to Abraham.

A verdict was taken, by consent, for the plaintiff for 201*l.*, with interest at 5 per cent. from the time the proceeds of the sale came to the defendants' hands, if the Court should think the plaintiff entitled to interest; leave being reserved to the defendants to move that the verdict might be entered for them, if the Court should be of opinion that no property or right to the possession of the cotton passed to the plaintiff by the deposit of the bill of lading with him by Abraham under the circumstances above stated.

Brett, Q.C., on a former day, obtained a rule nisi to enter a verdict for the defendants, or to reduce the verdict to such sum as the Court should direct, on the grounds,—that, as against the defendants, the plaintiff was not entitled to the goods or their proceeds; that there was no valid prior indorsement of any bill of lading to the plaintiff; that the bills of lading ceased to have effect as negotiable bills of lading on the landing and warehousing of the goods in Abraham's name; that the property in the goods never was in the plaintiff; that neither the plaintiff nor any other person had any right to or lien on the goods as against the defendants; that it never was agreed between Abraham and the plaintiff that the property in

the goods, or any lien on the goods, should pass to the plaintiff; that the property in the goods passed to the defendants on the transfer of the goods into their name by the wharfingers, the depositaries; that the defendants were pledgees, with possession and power of sale; that the plaintiff's rights, if any, were mere equities invalid against the defendants, or were for breach of contract by Abraham; and that no interest was payable.

Nov. 23. *E. James, Q.C.*, and *Sir G. Honyman, Q.C.*, shewed cause. The plaintiff, having made his advance to Abraham, in whom the property in the cotton was at the time vested, upon the security of the bill of lading, had a lien upon it which could not be defeated by the subsequent dealings between Abraham and the defendants. If the cotton had been afloat at the time, no question could have arisen. Does it make any difference that it had been landed? The claims of both plaintiff and defendants stand in the same position in that respect, save that the cotton was under stop for the freight at the time the plaintiff's advance was made. The circumstance of the wharfingers having subsequently attorned to the defendants, by giving them a warrant on their producing a third copy of the bill of lading, cannot affect the rights of the plaintiff; neither can the fact of the entry having been made by Abraham, and of the cotton standing in the wharfingers' books with his name as the importer. Under the Sufferance-Wharfs Act, 11 & 12 Vict. c. xviii (1), and the Merchant Shipping Acts Amendment Act, 1862,

(1) The material section of this act is the 4th, which provides that "all goods which after the passing of this act shall be landed at any of the public sufferance-wharves aforesaid" (Cotton's Wharf being one of them) "from or out of any ship within the port of London, and lodged in the custody of the wharfinger for the time being in the occupation of such wharf, either at such wharf or elsewhere, shall, when so landed, continue and be subject to the same lien or claim for freight in favour of the master and owner of the ship from or out of which such goods shall be so landed, or of any other person interested in the freight of the same goods, as such goods were subject to whilst the same were on board such ship, and before the landing thereof; and the said wharfinger, his servants and agents, are hereby required, upon due notice in writing in that behalf given by such master or owner or other person aforesaid to the said wharfinger, or left for him at his office or counting-house for the time being, to detain such goods in the warehouse of the said wharfinger until the freight to which the same shall be subject as aforesaid shall be duly paid, together with the wharfage, rent, and other charges to which the same shall have become subject and liable."

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25 & 26 Vict. c. 63, the rights of the owners of goods remain precisely the same as if the goods were still on board: the regulations contained in those acts were framed for the convenience of commerce and the protection of the ship-owner. The wharfinger is bound to retain the goods until the ship-owner's claim for the freight is satisfied, and to deliver them to the true owner of the bill of lading. He is a mere stakeholder or agent. The plaintiff's claim here would have been equally good if no bill of lading had been handed over to him at all: he was mortgagee of the cotton; and a mortgage of a chattel may be by parol: *Flory* v. *Denny*. (1) The fraudulent retention by Abraham of the third copy of the bill of lading could not alter the plaintiff's rights.

[WILLES, J. The rights of indorsees under bills of lading were much discussed in the judgment of Parke, B., in *Bryant* v. *Nix*. (2)]

And also in a recent case in this court, *Short* v. *Simpson*. (3)

[WILLES, J. The question here is, can a person have a valid pledge of goods in a dock or at a wharf without getting a warrant or actual delivery?]

The goods being under stop for freight at the time of the advance made by the plaintiff, the rights of all parties must be the same as if they had been still at sea. The delivery of the bill of lading was a symbolical delivery of the goods themselves.

Brett, Q.C., and *J. Brown, Q.C.*, in support of the rule. The same question substantially arises upon each count of the declaration; for, the plaintiff cannot recover upon the first count unless he makes out that the defendants have sold goods which are his property; and he cannot sustain the second count unless he shews that the property and the right to the possession of the cotton passed to him by the transaction of the 4th of March. That the property in the cotton might have passed to the plaintiff by a contract of *sale* on that day cannot be denied. But this was not a contract of sale: what took place on that occasion amounted to no more than inchoate pledge. There was an equally incomplete and ineffectual attempt to pledge the cotton to the defendants on the 7th of March; but that transaction became complete when on the 11th the cotton was transferred to their names by the wharfingers. One point which it will be material to consider, though it will not

(1) 7 Ex. 581. (2) 4 M. & W. 775. (3) Law Rep. 1 C. P. 248.

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be conclusive, is, whether the document which was handed to the plaintiff on the 4th of March was a *bill of lading*. Whilst goods are at sea, the property in them is represented by the bill of lading, and passes by indorsement and delivery of that document. That is by virtue of the law-merchant, because that is the only mode in which the possession of goods can under such circumstances be given. But, the goods being landed, the same reason does not apply: and the stop for freight makes no difference; that is a regulation introduced by the acts of parliament for the general convenience of commerce and the protection of the ship-owner: see 11 & 12 Vict. c. xviii. s. 1, and 25 & 26 Vict. c. 63, ss. 67, 68. By the bill of lading, the captain undertakes to deliver the goods to the person to whom he is by the bill of lading or the indorsement thereon directed to deliver them. That done, his contract as carrier is at an end, and he is no longer responsible for the goods. Whether they are landed under an entry made by him or by the owner of the goods makes no difference: from that moment they are at the risk of the merchant. In Blackburn on the Contract of Sale (1), it is said, that, "when goods are at sea the purchaser who takes the bill of lading has done all that is possible in order to take possession of the goods, as there is a physical obstacle to his seeking out the master of the ship, and requiring him to attorn to his rights; but, when the goods are on land, there is no reason why the person who receives a delivery-order or dock-warrant should not at once lodge it with the bailee, and so take actual possession of the goods." That is precisely what the plaintiff in this case should have done. By the original deposit of the bills of lading, both plaintiff and defendants took a mere equity. The defendants having by their diligence first acquired a legal title to the goods, their legal title must prevail.

[ERLE, C.J. The consequences of holding, that the fact of the goods having arrived at their destination alters the position of the parties, would be perilous in the extreme.

WILLES, J. I remember being counsel in a case in which Overend, Gurney, & Co. had advanced a large sum upon bills of lading after the goods had arrived. The point now urged was not suggested there.]

(1) Pages 297, 298, 302.

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No case has been found in which this precise question has been raised. The position of the Chartered Bank of India was different from that of the present plaintiff: the advance made by them was made whilst the goods were at sea. The person who first presents a bill of lading is entitled to the goods: *The Tigress.* (1) The mode of delivery of goods at these wharfs was much discussed in *Gatliffe* v. *Bourne* (2), where all the authorities are collected. The fact of the carrier having a lien for freight makes no difference: *Allan* v. *Gripper.* (3) By the Civil law, there might be an hypothecation of goods which would pass the property, subject to an equity of redemption: but by the law of England there can be no pledge or mortgage of goods without an actual transfer of the possession to the pledgee or mortgagee: Story on Bailments (4); Maclachlan on Shipping (5); notes to *Marsh* v. *Lee* (6); notes to *Basset* v. *Nosworthy* (7); notes to *Ryall* v. *Rowles.* (8)

[WILLES, J., referred to *Reeves* v. *Capper* (9) and *Martin* v. *Reid.* (10)]

Assuming that there may be a mortgage of a chattel, this transaction clearly does not amount to a mortgage; nor was it so intended: it was intended as a pledge and nothing else. The distinction between lien, pledge, and mortgage is well explained in *Harris* v. *Birch* (11), *Re Attenborough* (12), and in the notes to *Coggs* v. *Bernard.* (13) The transaction in *Flory* v. *Denny* (14) was intended to operate as a mortgage. *Bryans* v. *Nix* (15) was the case of an advance upon a boat-receipt, which has no bearing on this case.

Cur. adv. vult.

Nov. 24. ERLE, C.J. In this case a rule has been granted calling upon the plaintiff to shew cause why the verdict found for him should not be set aside, and a verdict entered for the defendants.

(1) 32 L. J. (P. M. & A.) 97.
(2) 4 Bing. N. C. 314; 3 M. & G. 643; in H. Lds. 11 Cl. & F. 45.
(3) 2 C. & J. 218.
(4) Sections 297—299.
(5) Page 45.
(6) 1 Wh. & Tu. L. C. Eq. 2nd ed. 497—504.
(7) 2 Tudor's L. C. Eq. 2nd edit. 5—22.
(8) 2 Tudor's L. C. Eq. 2nd ed. 651—683.
(9) 5 Bing. N. C. 136.
(10) 11 C. B. (N.S.) 730.
(11) 9 M. & W. 591.
(12) 11 Ex. 461; 25 L. J. (Ex.) 22.
(13) 1 Smith's L. C. 5th ed. at p. 194.
(14) 7 Ex. 581.
(15) 4 M. & W. 775.

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Upon the argument of that rule, the question appears to me to be resolved into this,—whether the delivery on the 4th of March, 1865, of the bill of lading of the cotton per the *Acastus* by Abraham to the plaintiff, for the advance made to him by the plaintiff on that day, operated as a valid pledge of the cotton. There can be no doubt that, if the cotton had been afloat, and the bill of lading in the hands of Abraham as the assignee thereof under ordinary circumstances, the obtaining an advance upon the deposit of the bill of lading would have been just as effectual and valid as if it had been made upon the actual deposit of the cotton itself; for, while the goods are afloat, it is common knowledge, and I should not think of citing authorities to prove it, that the bill of lading represents them, and the indorsement and delivery of the bill of lading while the ship is at sea operate exactly the same as the delivery of the goods themselves to the assignee after the ship's arrival would do. Then, the bill of lading having been delivered to the plaintiff for the advance so made, the contest on the part of the defendants (who afterwards obtained possession of the cotton under the circumstances which I will presently mention) has been, that the delivery of the bill of lading to the plaintiff on the 4th of March did not operate as a valid pledge of the cotton, because, as they insist, the ship having arrived at her port of destination, and the cotton having been landed and warehoused, the bill of lading was exhausted and spent, and ceased to have any operation as a symbol of property. The powerful and learned argument of the counsel for the defendants was based upon that assumption; and they further insisted that, by the law of England, there can be no valid pledge of a chattel without the delivery of possession, and therefore that the subsequent pledge of the cotton to the defendants, though equally inoperative at the first, yet coupled with the actual possession afterwards obtained by them justified them in dealing with the cotton as their own, and defeated the inchoate pledge to the plaintiff. Both plaintiff and defendants are persons of the highest respectability; and the only question is, which party is to be the loser by the fraud of Abraham.

The history of the dealing with this cotton disposes, I think, of the defendants' argument. The cotton was shipped at Madras in August, 1864, for London, on board the *Acastus*. The shippers

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drew upon the consignees against the cotton, handing over the bill of lading to the Chartered Bank of India, by whom the bills of exchange were discounted, in the common course of mercantile transactions of that nature. I call the document signed by the captain *a bill of lading*, because, though drawn in a set, the three copies in my judgment constitute one bill of lading. There is no contention that the deposit of the bill of lading with the Chartered Bank of India on their discounting the bills of exchange did not operate as a pledge of the cotton, or that the bank, or their representatives in London, would not have had a perfect right to indemnify themselves out of the proceeds of the cotton on arrival for the advances thus made by them. It is one of the most familiar and frequently occurring transactions that can be. It was a pledge, and a pledge only. The property in the cotton, subject to the claim of the bank, was in Messrs. De Suza & Co., to whom by the terms of the bill of lading the cotton was deliverable on payment of the freight. Before the arrival of the cotton, the property in it became vested in Abraham, who had succeeded to the business of Azémar & Co., by whom the contract for the purchase and shipment of the cotton had originally been made, subject, of course, to the pledge to the bank. Upon the arrival, therefore, of the *Acastus* in the port of London, the state of things was this:—The Chartered Bank of India held the bill of lading as a pledge or security for the bills of exchange which had been discounted by them at Madras; and, subject to that pledge, the property in the cotton was in Abraham. The *Acastus* arrived in London on the 31st of January, 1865, and Abraham, claiming to be the owner of the cotton, made the usual entry at the Custom House, as he lawfully might do without subjecting himself to the penalty imposed by the statute for making a false entry; and he accompanied that entry with a note or intimation that the cotton was to be taken to Cotton's Wharf, a sufferance-wharf in the port of London. Pursuant to the intimation so given, and the course of business as between the proprietors of sufferance-wharfs and the authorities at the Custom House, the cotton was conveyed in lighters from the ship's side to Cotton's Wharf, the whole 277 bales having been landed and received by the wharfinger by the 7th of February, with a stop for the freight due to the ship-owner. Subject to that

stop for freight, and to the pledge to the bankers for the sum advanced in Madras, the cotton was at Cotton's Wharf on the 4th of March. In the meantime, Abraham, it is said, had done some act of ownership in regard to the cotton. He had called at Cotton's Wharf and intimated that he had a claim to the cotton, and, through Messrs. Barber & Co., the brokers, he had been permitted to take samples, which was necessary in order to ascertain the quality and value of the cotton before offering it for sale. Thus, between the 7th of February and the 4th of March the cotton remained as described,—landed, but not delivered according to the bill of lading. The responsibility of the ship-owner as carrier may have been at an end when the cotton was handed over to the custody of the wharfinger; and, if it had been afterwards burnt, the loss might have fallen upon the merchant, and not upon the ship-owner. Whilst at a sufferance-wharf with a stop for freight, the goods are by the act of parliament declared to be subject in many respects to the same rights and liabilities as if they were still afloat. If Abraham had given a delivery order without the bill of lading, the wharfinger, as I read the evidence, would not have obeyed it, but would have withheld the cotton until the bill of lading was produced. The goods are landed for the convenience of the ship-owner, in order to enable him to use his ship for another voyage: but, until the freight is paid and the stop removed, the goods remain subject in many respects to rights derived through the bill of lading.

So stood this cotton on the 4th of March,—the bill of lading pledged to the Chartered Bank of India to secure the payment of the bills of exchange, and a stop on it for the freight. On that day, Abraham went to Meyerstein, the plaintiff, and asked him for an advance of 2500*l.* to enable him to pay off the lien which the Chartered Bank of India had upon the cotton for their advance, and to get the bill of lading; and, although he obtained from the bank the bill of lading by means of his own colourable cheque, which was probably afterwards paid out of the money received from Meyerstein, the substance of the transaction to my mind is exactly the same as it would have been if the bank had with the assent of Abraham transferred their lien to Meyerstein upon his reimbursing them the sum for which they held the bill

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of lading in pledge, or had trusted Abraham with the bill of lading to enable him to get the means of satisfying their claim. Was the bill of lading at that time exhausted or spent? In the hands of the bank, with whom it had been deposited as a pledge whilst the cargo was afloat, it had never ceased to be a valid and binding document. The treaty between Meyerstein and Abraham and the bank was that Meyerstein might obtain a bill of lading which was to be operative as a security at the time he got it. In the hands of Abraham himself it undoubtedly would have been operative to enable him to get the cotton delivered to him. Upon what principle, then, can it be said to have become an extinct and abortive security the moment it came to the hands of Meyerstein? At the time he made the advance, Meyerstein was not aware that the cotton had arrived and was landed; but I do not in the least rest my judgment on that circumstance. The bill of lading was in my opinion the symbol of property in the cotton at the time when Meyerstein received it from Abraham; and it was upon the faith of that that the advance was made. One contention on the part of the defendants was, that the pledge of the bill of lading to Meyerstein could not operate as a valid pledge of the cotton unless accompanied by actual delivery. But, as I have already said, in my opinion the bill of lading was the symbol of the property in the cotton, and by the delivery of the bill of lading the property passed just as if the cotton itself had been actually delivered over to Meyerstein. The defendants' case is, that the delivery by Abraham to Meyerstein of two of the three parts of the bill of lading amounted to no more than an agreement to pledge cotton of which possession was not given, and therefore operated nothing as against the defendants, they having subsequently, on the 11th of March, obtained under the delivery to them of the third part of the bill of lading, which remained in Abraham's hands, a transfer of the cotton in the wharfingers' books into their own names, for an advance of 2000*l.* made to Abraham on the 6th and 7th of March, the stop for freight having then been removed; for that, of two pledgees, each having an imperfect pledge, he who by his diligence first acquires a perfect and indefeasible pledge has the preferable title as well in equity as at law. I think there is no ground for that argument. The case of a third mort-

gagee getting rid of a second mortgage by getting in a first mortgage, has no analogy to the present case. I think the pledge to the plaintiff was a valid pledge; and, if so, his rights have been violated by the defendants, who are answerable to him for a conversion of the cotton, and also for the proceeds of the sale upon the count for money received. In the case of an ordinary pledge of a chattel, the possession must no doubt accompany the pledge. But, notwithstanding that nothing has been wanting in the way of research, the counsel for the defendants have been unable to produce any precedent to shew that the precise point raised in this case has ever before been the subject of legal discussion. Their argument has been ineffectual to my mind, because the whole foundation of it rests upon the assumption that the bill of lading was on the 4th of March extinct and deprived of all efficacy. If it were established that a bill of lading,—one of the most frequent securities for advances amongst mercantile men,—becomes exhausted and extinguished and ceases to be a security when the ship has reached her destination and the goods which it represents have been landed and warehoused, what a wide door would be opened for fraud! It is scarcely possible to exaggerate the evil consequences which would be likely to result from such a doctrine. There is no authority for it. My judgment, however, is narrowed to the particular circumstances of this case, as I have already stated them; because that is sufficient to entitle the plaintiff to retain his verdict. I believe the same law would apply if there had been no stop on the cotton for freight at the time the plaintiff made his advance and obtained the bill of lading,—if the cotton had been simply held by the wharfinger deliverable to the indorsee of the bill of lading, according to the custom of the trade at the port where it was landed. I believe that would be found to be the law. But, as I said before, I have not the least doubt that, under the peculiar circumstances of this case, the bill of lading was on the 4th of March the symbol of property in this cotton, and its delivery to the plaintiff operated in law as a delivery of the cotton itself, and consequently that this rule must be discharged.

WILLES, J. I am of the same opinion, and I should have contented myself with saying that I concur in everything the Lord

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Chief Justice has said, but that I understand it to be his wish that the several members of the Court should deliver their opinions seriatim, as if our judgment had been delivered at the conclusion of the argument yesterday. Accordingly, I will add my reasons to those of my Lord, though at the risk of detracting from the value of the judgment. The facts of the case have already been stated, and they may for the purposes of my opinion be shortly put thus,—Goods which had been shipped at Madras under a bill of lading making them deliverable in London on payment of freight, arrived at the port of destination, and were landed and deposited at a sufferance-wharf with a stop thereon for the bill of lading freight; so that in fact though delivered under such circumstances and to such extent that the ship-owner would not have been answerable for an accident happening to them, they were not capable of being received and taken possession of by the consignee or holder of the bill of lading without producing it and discharging the ship-owner's lien for freight. The wharfinger under these circumstances was at the lowest the common agent for the ship-owner and for the consignee or holder of the bill of lading,—agent for the consignee or holder, upon his producing the bill of lading shewing that he was entitled to the goods, and upon his paying the freight, to transfer the goods into his name, and to deliver them to him or give him a warrant for them,—and agent for the ship-owner, to retain possession of the goods, and to permit no one to exercise any control over them until the claim for freight had been satisfied. During this period, therefore, the bill of lading would not only, according to the usage, and for the satisfaction of the wharfinger that he was delivering to the right person, be a symbol of possession, and practically the key of the warehouse; but it would, so far at least as the ship-owner was concerned, retain its full and complete operation as a bill of lading, there having been no complete delivery of possession of the goods. There can be no complete delivery of goods until they are placed under the dominion and control of the person who is to receive them. Here, Abraham could not have the complete dominion and control of the cotton until he had discharged the liability incurred by the shippers for the freight stipulated for in the bill of lading.

That being the state of things, the consignee, before possession was given to him, and before he had a right to the delivery, wanted to deal with the goods, to obtain money for them. How was he to do this? As to a sale there was no difficulty, because, since the judgment of Lord Wensleydale (then Justice Parke) in *Dixon* v. *Yates* (1), it has never been doubted that by the law of England the sale of a specific chattel passes the property to the vendee, without delivery, notwithstanding the learned note of the late Serjeant Manning, in 2 M. & R. 566. If, therefore, the cotton in question had been sold out and out to Meyerstein or to anybody else on the 4th of March, the consequences of the fraud committed by Abraham in obtaining the subsequent advance from Barber & Co. would unquestionably have fallen upon the latter, and upon them alone. I do not say (because I am satisfied that it would be wrong to say so) that a pledge stands upon the same footing as a sale. But I notice this in passing, for the purpose of shewing that all arguments, founded upon the notion that the Court is to pronounce a judgment in this case which will protect those who deal with fraudulent people, are altogether beside the facts of this case, and foreign from transactions of this nature. To attempt such a task would be idle; to accomplish it, impossible. We must apply our minds to the facts of the case before us, and see what is their true bearing, and what is the proper conclusion we ought to arrive at in respect to the rights of the litigant parties, without considering what may hereafter happen to persons who omit to use due vigilance, and consequently have the misfortune to be overreached.

This was not the case of a sale, but simply a pledge to Meyerstein. And here I may observe again, that, if this had been a mortgage, whereby the entire property in the goods had been conveyed to Meyerstein, subject only to an equity of redemption, the fraud subsequently committed by Abraham might equally have been committed. Now, with respect to a pledge, according to the law of this country, a mere contract to pledge even specific goods, and even although the money is actually advanced upon the faith of the contract, is not sufficient to carry the legal property in the goods. I should have been quite satisfied by the

(1) 5 B. & Ad. 313.

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argument, if this had not been my own opinion before, that the law is so, and that such a transaction amounts only to an authority to take possession of the goods, and that the other consequences so ably pointed out by the counsel for the defendants would follow. But, in order to complete the pledge, it is not necessary that there should be an actual delivery of the chattel to the pledgee: it is sufficient, as was decided in *Reeves* v. *Capper* (1) and the other cases to which reference was made in the course of the argument, if there be a constructive delivery. It is not necessary that the subject of the pledge should have actually passed from the hands of the pledgor to those of the pledgee. The property in the goods may pass, even though they remain in the possession of the pledgor, provided they do so by virtue of a contract between the parties which makes the custody of the pledgor the custody of the pledgee. Such was the case of *Reeves* v. *Capper* (1), where the master of a vessel pledged his chronometer with his owner, under a contract by which he was to be allowed to retain possession of it for the purpose of the voyage he was about to undertake; and, the master having subsequently disposed of the chronometer to another person, the pledgee was held entitled to recover it from the purchaser. So, in many cases, a symbolical delivery is held to be sufficient,—a symbolical delivery being equivalent to such a constructive delivery as will complete a pledge. If it were necessary that I should lay down as in a code all the series of circumstances which might be held to constitute a symbolical delivery, I should have desired more time to consider the matter. I should have liked to consider, amongst other cases, whether the delivery of the key of the warehouse in which goods are stored was or was not a sufficient symbolical delivery of the goods, and whether the claim of the person to whom it was given could be defeated by the fabrication of another key in order to deceive a second lender. That, however, would be a case quite apart from the peculiar property which the law for the sake of mercantile convenience imputes to a bill of lading; because the lowest at which the plaintiff's case can be stated here is, that he got that which if he had at once produced it to the wharfinger would have procured for him the delivery of the goods mentioned in it, subject

(1) 5 Bing. N. C. 136; 6 Scott, 877.

to the charge thereon for freight, or an acknowledgment from the wharfinger that he held the goods for him. That is the very lowest at which the plaintiff's claim can be put: but I do not desire to consider that question at present, though it may be worth considering when the facts raise it properly, because here is another sort of delivery to which the law has from very early times imputed a peculiar effect. The bill of lading for this cotton was handed over to Meyerstein on the 4th of March. Now, as my Lord did, I will pass over the proposition, which is obvious, that the handing over a bill of lading for an advance under ordinary circumstances as completely vests the property in the goods in the pledgee, as if the goods had been put into his own warehouse. I merely refer to the case of *Ex parte Westzinthus* (1), as being the case in which that very matter was discussed and considered, and where it was held that a stoppage in transitu was defeated by such a transaction, subject to the pledgee of the bill of lading being bound to render an account to the unpaid vendor.

The question, therefore, is, whether Meyerstein, at the time he made the advance to Abraham, viz. on the 4th of March, made an advance upon a bill of lading. On the part of the defendants it is said that the thing upon which Meyerstein advanced his 2500*l*., though in appearance a bill of lading, was in reality only a piece of waste-paper,—a document which once was a bill of lading, but which had then ceased to exist as a bill of lading, and had become extinct. Can that argument be sustained? Does a bill of lading cease to have any operation or vitality when the goods are landed, even though they are remaining at the wharf where they were landed by the master as security for the freight? I am of opinion that that is not the true effect of such a transaction. I think the bill of lading remains in force at least so long as complete delivery of possession of the goods has not been made to some person having a right to claim them under it. I believe that will be found not only to be the law, but also to be in accordance with the convenience and the practice of carriers and merchants.

Now, I will consider the question as if it had arisen before the

(1) 5 B. & Ad. 817.

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passing of the Act of 1862 (1) or of any of the earlier statutes of which that is the modern representative. I will assume that there was no act of parliament empowering the ship-owner to land and warehouse goods at the expense and risk of the consignee or the holder of the bill of lading. What would then have been the state of things, if the *Acastus* had arrived in the port of London and had found no person ready to take delivery of the goods or to pay the freight? What would have been the master's duty? His duty undoubtedly would have been to deal with the goods in a reasonable manner, regard being had, of course, to his lien for freight. According to our law, he might have kept the goods on board the vessel on demurrage, at all events for a reasonable time; thus using the ship as a warehouse. That was found to be exceedingly inconvenient, and led to frequent disputes between the ship-owner and the consignee. But another course was open to the master. Having obtained a new employment for his vessel, he would be unwilling that she should be used as a mere warehouse, especially as the demurrage he might recover would often be no sufficient compensation for the detention in an inconvenient and perhaps an expensive port; and the law gave him the alternative of landing and warehousing the goods, giving notice to the consignee that they were at his disposal on payment of the freight, and having an action for the charges. That also was very inconvenient; for, although the ship-owner's liability as a carrier would be thus got rid of, he would incur a new liability as a warehouseman. It was inconvenient and unjust that the master should be forced to abandon his lien, or incur a chance of litigation in his new capacity of warehouseman, with all its dangers and risks. Accordingly, we find that a series of acts of parliament has been passed for the purpose of relieving the master from that difficulty. The local act which was referred to shews the progressive steps by which the legislature arrived at the conclusion which is embodied in the 67th and following sections of the 25 & 26 Vict. c. 63. Under those provisions, if the owner of the goods chose to enter them at the Custom House, and selected the wharf at which they were to be landed, the master caused them to be landed at that place, giving a notice to the wharfinger

(1) The Merchant Shipping Acts Amendment Act, 25 & 26 Vict. c. 63.

whereby he retained his lien for the freight; and the wharfinger was bound to hold the goods subject to that lien. In the event of no person entering the goods, the master was allowed to enter and land them; and, in that case, by the 1st section of the local act (1), the goods were to be considered as in all respects in the same custody as if they had remained on board the ship: thus, though the master got rid of the cumber on board his ship, he might still be exposed to the difficulty and litigation which might follow him in his character of warehouseman. Lastly came the act of 1862 (25 & 26 Vict. c. 63), which substantially gives the master the same powers, with some extension, which he had under the local acts, and powers very similar to those given to him under a variety of foreign codes. The master is bound to deliver the goods to the holder of the bill of lading. If there are more claimants than one, he may protect himself by an interpleader. But the person who holds the first bill of lading for value is entitled to the goods. Where the holder of the bill of lading presents himself, but is not ready to pay the freight, the master is entitled to secure himself by putting the goods into a warehouse. If there be any dispute or delay in the adjustment or payment of the freight, such dispute is to be settled in the way pointed out by the act. But, until the freight is paid, or the course so pointed out is pursued, the master still has a hold upon the goods for purposes contemplated in the bill of lading.

To consider this question properly, you must take the case of a master landing goods as at common law, without the assistance of any act of parliament, and placing them in the hands of a wharfinger, who is his agent, as in the case pointed out in the first section of the local act (1), and who holds the goods for him until the freight is paid, and then delivers them up on production of the bill of lading. As to that no question could well arise. The bill of lading would remain in full force until it was produced and delivery of the goods made by the person who was the master's agent for the purpose of securing his freight. Then we come to the act of parliament, and see what was its object. It professes to be dealing with the interests of ship-owners and shippers of goods and their consignees, and not with the effect of mercantile instruments.

(1) 11 & 12 Vict. c. xviii.

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That subject had been under the consideration of the legislature in statutes recently passed for regulating the rights of property under bills of lading, and facilitating their transfer. (1) The object of those acts seems to have been rather to extend than to cut down the efficacy of bills of lading. I cannot suppose that this act of parliament, which contains no express provision for the purpose, and in which I find no necessary implication of such a purpose, intended to weaken or destroy the rights of holders of bills of lading, or to render those instruments less capable of being dealt with and less operative than they were before. I entertain no doubt that the act leaves the rights of the parties just as they were; and that the bill of lading retains all its virtue and effect until there has been a complete delivery of possession under it: and there has been no such delivery here.

So far with respect to the law of this country. I feel reluctant to travel out of the road; but, Mr. Brown having referred to the authority of Mr. Justice Story (2), for the purpose of shewing how careful the laws of foreign states have been to guard against the dangers which would follow from allowing pledges to be made without actual delivery of the chattels, I have thought it right to search a little in the direction which his argument indicated; and I find anything but a confirmation of that notion as to bills of lading. If we turn to the section in Story, we find that he was not dealing with the present case or with anything like it. But, after giving the text from one of the writers to the effect that, where a person pledges goods, by the Roman law the pledgee may thereupon deliver back the goods to the pledgor, to be held as a special bailee or agent, and that will not destroy the right of the pledgee, he goes on to say, that this principle has not, from its inconvenience, generally found its way into the modern jurisprudence of Continental Europe, at least not without many restrictions. I need hardly say that the text referred to is, according to *Reeves* v. *Capper* (3), to the effect of our own law: and I need hardly add that the observations of Mr. Justice Story, taken with the text, are not at all applicable to the present case.

(1) 18 & 19 Vict. c. 111, and the Factors Acts, 4 G. 4, c. 83; 6 G. 4, c. 94; 5 & 6 Vict. c. 39.

(2) Story on Bailments, ss. 298, 299.

(3) 5 Bing. N. C. 136; 6 Scott, 877.

I have looked also at the French code, which expands in this respect the provisions of the Ordonnances of 1681, and recognises the negotiability of the bill of lading, but contains no absolute provision on the subject of how long it shall continue. (1) The Spanish code does, in art. 802, contain, besides the statement of what the bill of lading shall contain, an express provision that it may be indorsed, and that the indorsement shall carry all rights of the indorser with it. It seems to allow an indorsement of a right of action, as in our law since the 18 & 19 Vict. c. 111: and I observe that an eminent Spanish commercial lawyer, Don Gomez de la Serna, whose edition of the code I refer to, says that in this respect bills of lading are very much upon the same footing as bills of exchange. There is no provision in either of those codes that the bill of lading shall cease to be operative at any given time: and there is in both a provision for enabling the master to put the goods into third hands ("en tierces mains"), when the freight is unpaid, to remain as a security for the master's claim. In the code adopted by Prussia and other German States of the Zollverein,—which, as is well known, is more elaborate than the other codes,—there are similar provisions, and exceeding care is taken to protect both the master and the person who is to receive the goods under the bill of lading; and in article 624 I observe that the right of the master is considered to stand upon the same footing, whether the goods are retained by him for the freight or deposited in the hands of a third person for the purpose of being kept. Article 649 puts the delivery of the bill of lading upon the same footing precisely as the delivery of the goods, as stated by my Lord. And I notice in article 651 an express provision for the case which has occurred here, of the several parts of the bill of lading getting into the hands of several persons, and a declaration that he who is first in point of time in getting a part of the bill of lading has priority in point of law. In each of those countries the practice is to have several original bills of lading.

In the absence, therefore, of any fraud on his part, it being admitted that the plaintiff advanced his money upon the security of a bill of lading which he believed to be at the time a valid and operative document, and that he had no notice of any circum-

(1) Code de Commerce, liv. 2, tit. 7, art. 281; p. 315, edit. 1851, par M. N. Bacqua.

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stances which could invalidate it, and that bill of lading still retaining in my judgment the properties which are by law incident to it, I am clearly of opinion that he is entitled to recover.

I will add but a few words more to this judgment, because they express the motive in my mind for arriving at it. The law gave the peculiar effect it has to the bill of lading in consequence of the difficulty of an actual delivery of the possession of goods which are the subject of a mercantile adventure. So long as difficulty exists by reason of the incidents of the adventure, so long does the reason apply. And such a difficulty did exist in this case; because the freight of the cotton not having been paid at the time Meyerstein made his advance, and it being stopped in the hands of the wharfinger for the security of the ship-owner, there could have been, as matters stood, no actual delivery of the goods by Abraham. They were, therefore, in the same position, so far as there is reason for holding the bill of lading to remain the symbol of possession, as if they had been still afloat.

3 PC 148

Having considered this case with all the interest and anxiety that one is bound to apply to a case which in its results may affect so many transactions of a similar nature, I cannot assent to the doctrine advanced by the learned counsel for the defendants. I therefore entirely concur with my Lord in thinking that the plaintiff is entitled to retain his verdict, and that the rule obtained by the defendants should be discharged.

KEATING, J. I entirely concur in the opinions so elaborately expressed by my Lord and my Brother Willes; and I will only state in a few words the way in which the case strikes my mind. The foundation of Mr. Brett's very able argument was this, that, the object of the bill of lading being the delivery of the goods, the moment that object has been completely accomplished, the bill of lading ceases to exist as an operative instrument. He then contended that, the cotton having been removed from the ship and landed at Cotton's Wharf, and remaining there ready to be delivered to the consignee on payment of the freight, the entire object of the bill of lading had been accomplished, and it ceased to be available for any purpose,—or, at all events, its delivery to the plaintiff could have no effect whatever as a transfer of the property in

the cotton, but at the most only operated as a mere delivery order, a document which if used might obtain for him the delivery of the goods. It is obvious that the whole force of that argument rests upon the supposition that on the 4th of March, upon which day Meyerstein made the advance to Abraham, the document which was handed over to him had ceased to have any operative force as a bill of lading, and that because there had been a complete delivery of the cotton. But, for the reasons already so fully stated by my Lord and my Brother Willes, I think there had been no complete delivery on that day; and I adopt the way in which my Brother Willes has put it, as a safe guide to what may be considered as a complete delivery. There can be no complete delivery of goods under a bill of lading until they have come to the hands of some person who has a right to the possession under it. Now, here, it is clear, that, on the 4th of March, the cotton in question was held by the wharfinger subject to the stop for freight. It never had been delivered to any person whatever having a right to receive it under the bill of lading. That being so, the whole foundation of the argument so much pressed by the learned counsel for the defendants vanishes at once, and consequently the plaintiff is entitled to retain his verdict.

Sir G. Honyman. Under the arrangement entered into at the trial, the verdict was to be entered for 2019*l.* and interest at 5 per cent., if the Court should think fit. That will be interest from the time when the proceeds of the sale of the cotton came to the defendants' hands.

PER CURIAM. Be it so.

Rule discharged accordingly. (1)

Attorneys for plaintiff: *Thomas & Hollams.*
Attorney for defendants: *W. A. Crump.*

(1) See *Pease* v. *Gloahec*, Law Rep. 1 P. C. C. 219.

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Nov. 26.

RANDOLPH and Others *v.* MILMAN and Others.

Convocation—Prebendaries—Cathedral Chapters—Right of Voting for Proctors.

The non-residentiary prebendaries of cathedrals have ceased to be members of the chapters since the passing of 3 & 4 Vict. c. 113, and have therefore no right to vote at the elections of proctors to represent the chapters in convocation.

Reversed by Ex. Ch. 4 C.B. 107

This was a special case stated for the opinion of the Court without pleadings.

The plaintiffs are non-residentiary prebendaries of the Cathedral Church of St. Paul, London; and the defendants are the dean and canons of that cathedral.

Originally and before the alterations made in the constitution of the chapter of the cathedral, as stated in the next paragraph, the chapter of the cathedral consisted of thirty prebendaries, each of whom had a stall in the choir and a place and voice in the chapter assigned to his prebend, but there was anciently no prebend annexed to the office and dignity of dean, nor had the dean, unless he also happened to be a prebendary, any place or voice in the chapter.

Several centuries ago, and before the Reformation, one of the thirty prebends founded in the cathedral, together with a place and voice in the chapter, was permanently annexed to the office and dignity of dean of the cathedral, and ever since such annexation, down to the passing of the statute 3 & 4 Vict. c. 113, in the year 1840, the chapter of the cathedral consisted of thirty prebendaries, of whom the dean was one.

All the prebends founded in the cathedral were originally in the gift of the bishop of London, and with the exception of the prebend permanently annexed to the office and dignity of dean, all the prebends remained in the gift of the bishop down to the passing of the aforesaid act. Upon the happening of a vacancy in any of the prebends founded in the cathedral, and so remaining in the gift of the bishop, the bishop collated a person chosen by himself to the vacant prebend, and the chapter afterwards formally inducted such person into the real actual and corporal possession of his prebend, and formally received him as a prebendary of the

church, and assigned to him the stall in the choir and the place and voice in the chapter usually assigned to the prebend to which he had been collated, and after such induction, installation, and reception, and not before, the person collated became a prebendary of the said cathedral.

Of the above-mentioned thirty prebendaries, in ancient times the dean and some of the others resided within the precincts of the cathedral, and officiated and performed public service in the cathedral; and the dean and other prebendaries so residing became in course of time distinguished from the other (non-resident) prebendaries, and were styled in papal and other ancient documents residentiaries, or canons residentiary. The number of residentiary canons was in the year 1840, and had been for some centuries anterior to that date, three, and three only, exclusive of the dean, who was himself also a prebendary and canon residentiary. When a vacancy occurred amongst the canons residentiary, it was filled up by election from amongst the existing prebendaries by the other canons residentiary. Since the Reformation the Crown issued letters recommendatory for such elections.

With the exception of the privilege of non-residence, the residentiary canons enjoyed all the rights and privileges enjoyed by the non-residentiary prebendaries, but the latter did not enjoy all the rights and privileges of the former. The dean and residentiaries alone transacted the general business, and had the custody of the corporate seal, and the management of all property not specifically appropriated to particular stalls or offices, and they alone enjoyed the revenues yielded by such unappropriated property. So far as can be ascertained, the non-residentiary prebendaries never attended and were never summoned to attend meetings of the chapter, except when held on the occasions and for the purposes mentioned in the next paragraph. Every prebendary, however, residentiary as well as non-residentiary, enjoyed the emoluments and managed the property constituting his own prebend according to his own judgment, irrespective of the chapter.

From time immemorial down to the year 1840, the non-residentiary prebendaries of the cathedral were summoned to attend meetings of the chapter on the occasion of the election from time to time when a vacancy occurred by death or otherwise of the

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bishop of London, and of their own dean (after the Reformation under a congé d'élire, or letter recommendatory from the Crown), and also on the occasion of the choice and election from time to time according to the ancient custom and the common law of this country, and in pursuance of writs directed by the Crown to the archbishop of the Province of Canterbury, and of mandates from the bishop of London, of a proctor to represent the chapter in the lower house of the Convocation of the Province of Canterbury. The non-residentiary prebendaries were not summoned, and did not attend on any other occasions.

In the year 1840 an act was passed (3 & 4 Vict. c. 113), intitled, "An act to carry into effect with certain modifications the Fourth Report of the Commissioners of Ecclesiastical Duties and Revenues." This act was afterwards amended by 4 & 5 Vict. c. 39, and 13 & 14 Vict. c. 94. If the Court considered themselves at liberty to refer to the report for the purpose of construing the acts, or any of them, or otherwise, a printed copy of the report was to form part of the case.

The plaintiffs, Thomas Randolph and John Honywood Randolph, were prebendaries of the said cathedral at the time of the passing of 3 & 4 Vict. c. 113. The plaintiffs, John Edward Kempe, Frederick Blomfield, Thomas Fraser Stooks, and William Josiah Irons, had all been collated to prebends in the cathedral since the passing of that statute. All the plaintiffs had been received as prebendaries in the church, and had had assigned to them the stalls usually assigned to their respective prebends.

The defendant, Henry Hart Milman, was appointed by her present Majesty to the deanery of the cathedral since the passing of the 3 & 4 Vict. c. 113, and the other defendants had been appointed canons of the cathedral also since the passing of the same act.

Owing to the language of the act doubts had arisen respecting the exact legal position of the prebendaries of the cathedral of St. Paul and of the dean and canons thereof, and particularly with respect to the questions, first, whether the prebendaries were still entitled to be summoned to attend, and to attend and vote at the meetings of the chapter of the cathedral on the occasions of an election of the bishop of London and of a proctor to represent the

chapter in convocation; and if they were, then secondly, whether the dean and canons who did not hold prebends in the cathedral were entitled to attend and to vote at the meetings of the chapter on such occasions.

On the 14th of July, 1865, a writ was directed by her Majesty the Queen to the archbishop of Canterbury, directing him to summon a convocation of the bishops and clergy of the province of Canterbury, and in pursuance of the writ the archbishop issued his mandate to the bishop of London, directing him to summon representatives of the chapters and clergy in the several dioceses in the province; and in pursuance of such direction, the bishop of London issued his mandate to the dean and chapter of the cathedral church of St. Paul, requiring the dean personally, and the chapter by a proctor duly appointed by the said chapter, to appear before the archbishop in the chapter-house of the cathedral on a day mentioned in the mandate.

In anticipation of an election of a representative or proctor by the chapter of St. Paul's, the plaintiffs gave the following notice to Mr. Christopher Hodgson, the registrar to the dean and chapter of the cathedral church of St. Paul, London:—

"We, the undersigned prebendaries of the cathedral church of St. Paul, on behalf of ourselves and all other the prebendaries of the said cathedral church, hereby caution and warn you, and all other persons whom this may concern, not to proceed to or towards the election of a proctor to convocation from the said cathedral church at any chapter to which the said prebendaries are not duly cited and admitted; and let nothing be done towards the holding of a chapter of the said cathedral church for such an election without the said prebendaries being first duly cited to appear thereunto according to ancient form and custom.

Dated the 11th day of July, 1865."

Signed by the plaintiffs.

On the 8th of August, 1865, a meeting of the defendants, the dean and canons, was held in the chapter-house of St. Paul's, at which the defendant, Henry Hart Milman, as dean of the church, presided, in order to elect a proctor to convocation; yet, notwithstanding the above notice, the plaintiffs were not cited nor admitted

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to such meeting, and it is admitted, for the purposes of this case only, that the plaintiffs were prevented by order of the defendants from attending the meeting, and from voting for the election of the proctor, and accordingly a proctor was elected to represent the chapter by the defendants the dean and canons only, without any votes from the plaintiffs or any other prebendaries of St. Paul's.

The questions for the opinion of the Court were, first, whether the plaintiffs, as prebendaries of St. Paul's, were entitled to be so cited or to attend or to vote at the meeting. And if they were, then, secondly, whether the defendants, the dean and canons of the said cathedral, were also entitled to vote as members of the chapter on such election.

Coleridge, Q.C. (*J. F. Stephen* with him). The question in this case is, whether the non-residentiary prebendaries of St. Paul's Cathedral are entitled to vote at the election of a proctor to represent the chapter of St. Paul's in convocation. Convocation is a body well known to the common law: in fact, in the earliest times it formed part of the parliament of the nation, and even down to the time of Charles 2, the clergy were always taxed by it, and not by the parliament. It is referred to by Lord Coke in 4 Inst. 323, and though from the reign of Queen Anne till within the last few years it met little more than as a matter of form, its legal position and the possibility of recalling it to greater activity, were always recognised, as for example by Burke in his letter to the sheriffs of Bristol.

From time immemorial all the prebendaries have had a right to vote at the election of a proctor to represent the chapter in this ancient body, and the only question is, whether that right has been taken away by 3 & 4 Vict. c. 113 from those who are non-residentiary. Now the way in which that act deals with the non-residentiary prebendaries appears to be as follows: it takes away all their emoluments and these it vests in the ecclesiastical commissioners, and preserves to them all their other rights and privileges; and in fact so far was the legislature from intending to do away with the non-residentiary prebends that the act creates a non-residentiary body called honorary canons in cathedrals where none previously existed. The sections of the act bearing on the subject are the 1st, 2nd,

22nd, 23rd, 44th, 51st, 75th, and 93rd. (1) The 51st section expressly preserves all the rights except those relating to their emoluments to the prebends; it is not merely to the prebendaries who were then possessed of the prebends, but to the prebends themselves,

(1) 3 & 4 Vict. c. 113 enacts:

Section 1. "That from henceforth all the members of chapter, except the dean, in every cathedral and collegiate church in England, and in the cathedral churches of St. David and Llandaff, shall be styled canons; and the precentor of the cathedral church of St. David, and the warden of the collegiate church of Manchester, shall be respectively styled dean.

Section 2. "That, subject to the provisions hereinafter contained, the number of canons in the several cathedral and collegiate churches of the new foundation, and in the cathedral churches of St. David and Llandaff, and in the Queen's free chapel of St. George, within the castle of Windsor, and of canons residentiary in the several cathedral churches of the old foundation in England, shall be the number respectively specified in the schedule hereto annexed.

Section 22. "That, subject to the provisions hereinafter contained, after the passing of this act, no presentation, collation, donation, admission, election, or other appointment to the dignity or office of sub-dean, chancellor of the church, vice-chancellor, treasurer, provost, precentor, or succentor, nor to any prebend not residentiary in any cathedral or collegiate church in England, or in the cathedral churches of St. David and Llandaff, or in the collegiate church of Brecon, shall convey any right or title whatsoever to any lands, tithes, or other hereditaments, or any other endowment or emolument whatsoever now belonging to such dignity, office, or prebend, or enjoyed by the holder thereof in right of such dignity, office, or prebend, or any part thereof, provided that nothing herein contained shall be construed to deprive any present or future holder of any office in any cathedral or collegiate church actually performing duties in respect of such office of any stipend or other emolument heretofore accustomably assigned to such office, or paid to the holder thereof, according to the statutes of such church, out of the revenues thereof.

Section 23. "Whereas it is expedient that all bishops should be empowered to confer distinctions of honour upon deserving clergymen, be it enacted that honorary canonries shall be hereby founded in every cathedral church in England in which there are not already founded any non-residentiary prebends, dignities, or offices, and the holders of such canonries shall be styled honorary canons, and shall be entitled to stalls and to take rank in the cathedral church next after the canons, and shall be subject to such regulations respecting the mode of their appointment and otherwise as shall be determined on by the authority hereinafter provided, with the consent of the chapters of the said cathedral churches respectively; and the number of such honorary canonries hereby founded in each cathedral church shall be twenty-four; and it shall be lawful for the archbishops and bishops respectively, if they shall think fit, from time to time to appoint spiritual persons to such honorary canonries, provided that not more than eight of such honorary canons shall be appointed in any diocese within the year next after the passing of this act, nor more than two in any subsequent

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and therefore to all future holders of them. The 22nd section shews that there are to be collations to prebends after the passing of the act, and that there could, therefore, be no intention of destroying them. The 23rd section creates the new office of honorary

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year, except in the case of the vacancy of any honorary canonry by death, resignation, or otherwise, provided also that no emolument whatever, nor any place in the chapter of any cathedral church, shall be taken or held by any honorary canon in virtue of his appointment as such canon.

Section 44. "That, upon the vacancy of any benefice in the patronage of the chapter of any cathedral or collegiate church, the chapter shall present or nominate thereto either a member of such chapter, or one of the archdeacons of the diocese, or a non-residentiary prebendary or honorary canon, as the case may be, or any spiritual person who shall have served for five years at the least in the office of minor canon or lecturer of the same church, or of master of the grammar or other school (if any) attached to or connected with such church, or as incumbent or curate in the same diocese, or as public tutor in either of the universities of Oxford and Cambridge, . . . and that any such office of minor canon, lecturer, schoolmaster, professor, reader, lecturer, or tutor shall immediately upon the expiration of one year from the time of his institution to such benefice, if not previously resigned, become and be vacant; and that, if neither a member of the chapter, nor an archdeacon of the diocese, nor a minor canon, nor lecturer, nor such schoolmaster, incumbent or curate, professor, reader, lecturer, tutor, licentiate or graduate, as the case may be, shall be presented or nominated to such benefice within six calendar months from the time of the vacancy thereof, the bishop of the diocese in which the same is situate may, within the next six calendar months, collate or license thereto a spiritual person who shall have actually served within such diocese as incumbent or curate five years at the least; and if no such collation or license shall be granted within such time, the right of presentation or nomination to such benefice for that time shall lapse to the archbishop of the province.

Section 51. "That all lands, tithes, and other hereditaments, excepting any right of patronage and all other the emoluments and endowments whatsoever belonging to the deaneries of Wolverhampton, Middleham, Heytesbury, and Brecon, and to the dignity or office of sub-dean, chancellor of the church, vice-chancellor, treasurer, provost, precentor, or succentor, and to any prebend not residentiary in any cathedral or collegiate church in England, or in the cathedral churches of St. David's and Llandaff, or in the collegiate church of Brecon, or enjoyed by the holder of any such deanery, dignity, office, or prebend as such holder, shall, as to all such of the said deaneries, dignities, offices, and prebends respectively as may be vacant at the passing of this act, immediately upon its so passing, and, as to all others, immediately upon the vacancies thereof respectively, without any conveyance or assurance in the law other than the provisions of this act, accrue to, and be vested absolutely in, the ecclesiastical commissioners for England and their successors for the purposes of this act: Provided always that all other rights and privileges whatsoever now by law

canons, and specially provides that honorary canons shall not be members of the chapter, thereby distinctly implying that the non-residentiary prebendaries, with respect to whom no such provision exists, would continue members of the chapter. The defendants will doubtless rely on the 1st section, but if that does really use the word chapter strictly and not only for those who usually voted at it, its only effect is to confer on all prebendaries the title of canon, and in fact in official documents they have been so called since the passing of the act. That this is so is shewn by the expression "canons residentiary" in the 2nd section, which implies the existence of other non-residentiary canons. The 75th section also speaks of the future appointments of prebendaries, while

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belonging to any of such dignities, offices, or prebends, except the said last-named deaneries, shall continue to belong thereto, except so far as any of such rights or privileges may be controlled or affected by any of the provisions of this act respecting the right of election now exercised by any chapter: Provided always, that nothing herein contained shall in any manner apply to or affect any dignity, office, or prebend which is permanently annexed to any bishoprick, archdeaconry, professorship, or lectureship, or to any school or the mastership thereof, or the prebends of Burgham, Bursalis, Exceit, and Wyndham, in the cathedral church of Chichester.

Section 75. "That nothing in this act contained respecting the division of corporate property, the diminution of the income of any deanery or canonry, the severance of separate property, or the limitation of the exercise of patronage possessed in right of separate property, shall affect any dean, canon, prebendary, dignitary, or officer in possession at the passing of this act, except as hereinbefore expressly enacted; but every dean, canon, prebendary, dignitary, and officer hereafter appointed shall be subject to such regulations as shall be made in pursuance of this act; and that the provisions herein contained respecting the qualification of persons to be presented to any benefice in the patronage of any chapter, or the apportionment of the income of any such benefice, shall not affect such chapter so long as any person who shall be a member thereof at the passing of this act shall continue such member; and that with respect to benefices in the patronage of either of the chapters of St. Paul, in London, and of Lincoln, the fourth or junior canon for the time being shall not have any voice in the exercise of such patronage so long as any one of the present members of such chapter shall continue to be a member thereof.

Section 93. "That in the construction of this act the term 'canon' shall be construed to mean only every residentiary member of chapter, except the dean heretofore styled either prebendary, canon, canon residentiary, or residentiary; and the term 'minor canon' shall be construed to extend to and include every vicar, vicar choral, priest vicar, and senior vicar, being a member of the choir in any cathedral or collegiate church."

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it saves to the existing prebendaries their rights of property and the exercise of patronage, which, as has been submitted, are all that the act interfered with. Lastly, the 93rd section by speaking of the residentiary members of the chapter clearly implies that there are others who are not so, and they can only be the non-residentiary prebendaries. So far, therefore, from the act expressly taking away the common law right which is in question in this action, and which could only be taken away by a clearly-expressed intention in the act to that effect, it both expressly and impliedly preserves it. The rights of election mentioned in section 51, as being interfered with by the act, were the rights of election of the dean and of the canons which existed in many cathedrals. The appointment to these offices is by the act vested in all cases in the Crown.

With respect to the second question there can be no difference of opinion. Whatever be the rights of the non-residentiary prebendaries, the dean and canons are clearly made by the act members of the chapter, and are as such entitled to vote.

Mellish, Q.C., for the defendants. It is clear that the right to elect a proctor is in the chapter. The mandate of the archbishop directed the bishop to summon a representative of the chapter, and the mandate of the bishop was directed to the chapter directing them to elect a proctor to represent them. It is clear also that, till the passing of the act 3 & 4 Vict. c. 113, the prebendaries were members of the chapter, and were in fact the only members of it, the dean and canons being members of the chapter only in right of their prebends. The sole question, therefore, is, whether since the passing of the act the chapter consists only of the dean and four canons, or whether, as before, it includes the non-residentiary prebendaries. The report on which the act is founded recommended that the chapter should for the future consist of a dean and four canons, and the other prebends be abolished. The act, however, does not entirely carry out the recommendations of the report, for it preserves the prebendaries as an honorary body, and creates a similar honorary body in the cathedrals in which there had previously been none; but it is submitted that it does, according to the suggestion in the report, make the chapter consist for the future of only the dean and the four canons. The case really

turns on the 1st and 93rd sections of the act. The 93rd section says that the term canon shall be construed to mean only every residentiary member of the chapter; then the 1st section says all the members of the chapter shall be styled canons; putting the two together, therefore, it appears that all the members of the chapter are to be residentiary members. This is confirmed by the fact that wherever the word "chapter" is used throughout the act it appears to refer only to the dean and four canons. Thus in section 11 it is provided that in the chapter of Exeter cathedral three canonries shall be suspended, but it was not meant that non-residentiary prebends should be suspended, so "canonry" cannot be construed to include them. So in section 12 the canonries must evidently be such as had emoluments attached to them. In section 17 it is provided that there shall be a *fourth* canonry in St. Paul's Cathedral, this could not be if there were already thirty. In section 22 the name prebend is used as applicable after the act, so it could not have been intended that all the prebendaries should subsequently to the act be called canons. The recital of the 23rd section points out that it is desirable that bishops should be empowered to confer distinctions of honour upon deserving clergymen, which was clearly therefore the reason why the non-residentiary prebends were retained. The 41st section distinguishes "deans and other individual members of chapter" from prebendaries, dignities, or officers non-residentiary; which clearly shews that non-residentiary prebendaries are not members of chapter. The 44th section is even more distinct, providing that the chapter may present to any vacant benefice in their patronage either "a member of such chapter," or "a non-residentiary prebendary."

The 51st section which is relied on by the plaintiffs really points to an opposite conclusion to that for which they contend; it provides that all existing rights shall continue to belong to the prebends, except in as far as any such rights may be controlled or affected by any of the provisions of the act respecting the right of election exercised by any chapter: this implies that when a prebendary has a right of election as a member of the chapter, it is affected by the provisions of the act, and he will lose it. The rights of election are not those which are taken away from the chapter, but such as are taken away from the prebendaries by

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the alteration in the chapter. In the succeeding act, 4 & 5 Vict. c. 39, s. 16, the same usage appears, the terms "member of chapter" and "canon" being used as synonymous.

Coleridge, Q.C., in reply. The different cathedrals attached different meanings to the word canon; some including, and some not, the non-residentiary body under that name; the 93rd section therefore only means to explain the sense in which it is used in the act. The 1st section does not refer to the meaning of the term canon in the act, but to the style by which the members of chapter were to be known for the future. The report of the commissioners affords no argument; it certainly has not been carried out in the act. The 44th section is capable of explanation. In some cathedrals there were no prebendaries, in others there were. The 1st clause of that section refers to the first class of cathedrals and the "non-residentiary prebendaries" to the others.

Cur. adv. vult.

Nov. 26. The judgment of the Court (Erle, C.J., Willes, Byles, and Keating, J.J.) was delivered by

ERLE, C.J. In this case the plaintiffs are non-residentiary prebendaries of St. Paul's; and the question is, whether they are entitled to vote in the chapter of St. Paul's in the election of a proctor to represent the chapter in convocation.

The mandate of the bishop directs the election to be made by the chapter: and the governing question is, Are the non-residentiary prebendaries members of the chapter?

The history of the chapter appears in the case. At one time it included both the residentiaries and non-residentiaries: and, although the residentiaries became the governing body, and excluded the non-residentiaries from many privileges, still they were not excluded from the chapter before the statute 3 & 4 Vict. c. 113. The construction of that statute, therefore, governs our judgment.

The defendants allege that the non-residentiaries ceased to be members of the chapter by its operation: and we are of that opinion.

By s. 1 it is enacted, in effect, that henceforth all the members of chapter in every cathedral church shall be styled canons. We construe this to mean that no one can be a member of chapter who

is not a canon. The words are, that every member of chapter shall be styled canon. It was contended that the enactment was confined to the style and not to the substance. But we think the legislature considered that those who were styled canons must be canons.

Then s. 93 enacts, in effect, that, in the construction of this act, the term canon shall be construed to mean only every residentiary member of chapter. We consider that the construction of this section is clear, and that the term "canon" cannot comprehend a non-residentiary. The plaintiffs are non-residentiaries. By s. 93, they are not canons; and by s. 1, they cannot be members of chapter, because they are not canons.

This construction is confirmed incidentally by s. 44, enacting that, upon the vacancy of any benefice in the patronage of the dean and chapter, the chapter shall present either a member of the chapter, or an archdeacon, or a non-residentiary prebendary, or an honorary canon. We consider that the legislature defines the different classes of persons to be presented, and that non-residentiary prebendaries are in a different class from that of the members of the chapter.

Great reliance was placed for the plaintiffs on the 51st section, vesting the endowments and other emoluments of any prebend non-residentiary in any cathedral, in the ecclesiastical commissioners, with a proviso that all other rights and privileges whatsoever now by law belonging to any such dignities, offices, or prebends, shall continue to belong thereto, except so far as any such rights or privileges may be controlled or affected by any of the provisions of this act respecting the right of election now exercised by any chapter.

We are of opinion that this proviso has no bearing on the question whether the non-residentiary ~~canons~~ prebendaries are to continue members of the chapter. The proviso relates to rights belonging to the particular prebend, and not to the chapter generally. And the other sections of the act shew that the right of election is in this case controlled by the operation of those sections.

For these reasons, we think the judgment must be for the defendants.

Judgment for the defendants.

Attorneys for plaintiffs: *Pemberton, Meynell, & Co.*

Attorneys for defendants: *Lee & Bolton.*

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LINGWOOD, Appellant; GYDE, Respondent.

Copyhold Act, 1852 (15 & 16 *Vict. c.* 51), *s.* 16—*Enfranchisement—Facilities for Improvement.*

The lord of a manor is entitled, on the enfranchisement of a customary freehold, to compensation in respect of the advantages accruing to the customary freeholder from the removal of restrictions on leasing or other disabilities attending his customary estate.

The amount of the compensation is a question of fact for the valuer, and depends upon the extent to which the value of the property is in the particular case increased by the removal of such restrictions.

Case stated by an assistant copyhold commissioner, under the Copyhold Act, 1852 (15 & 16 Vict. c. 51), s. 8.

The appellant was the lord of the manor of Cheltenham. The respondent was a copyhold tenant of certain lands and tenements within the said manor. The customary freeholds of the manor passed by admittance and surrender. Previously to the passing of the Cheltenham Manor Act, they had been held according to the custom of the manor, but not at the will of the lord. Since the passing of the act they had been, and still were, held according to the custom of the manor, as settled by act of parliament. The respondent held his lands to him and his heirs, according to the custom of the manor, as settled by that act. The Cheltenham Manor Act was passed in the year 1625.

In the course of valuations taken under the copyhold acts, with the view to the enfranchisement of certain lands and tenements, held by the respondent as above-mentioned, the following questions arose, and were referred by the respondent to the commissioners:—

1st. Whether in that manor the lord was entitled to claim any consideration in respect of timber?

The assistant commissioner decided that the lord was not entitled to claim any consideration in respect of timber.

2nd. Whether in that manor the lord was entitled to claim any consideration in respect of facilities for improvement?

No evidence was given at the hearing by the lord in support of his claim to any consideration in respect of facilities for improvement.

The tenant proved, not only that no forfeiture of any tenement held of the manor had taken place, but that the fines, rents, and

sums paid for heriots, and all other payments, were certain, and that when a tenement was divided, the fines, rents, and other payments, were also divided and apportioned.

It was contended, however, on the part of the lord, that if the tenement of a copyholder was increased in value by building upon it, or by other improvement, the lord's estate or interest therein, contingent upon the tenement falling into his possession by escheat or forfeiture, was by those acts also improved and increased in value; and further, that in the event of a copyhold tenement being divided, leases of the divided portions of the tenement would be increased in number, and that an additional benefit or improvement of his estate would accrue to the lord by reason of the additional sums payable to him on the grant of leases; and that in respect of the above-mentioned particulars, he was entitled to compensation as for facilities of improvement.

The right of the lord to compensation depends upon the construction to be placed upon 15 & 16 Vict. c. 51, s. 16 (1), with respect to the particulars which fall within the definition of facilities of improvement in which the lord is entitled to share.

It was proved that the tenements of the copyholders had been improved by building thereon, and that great facilities for improvement by building still existed. But the assistant commissioner concluded, as a matter of law, and upon the construction of the act (15 & 16 Vict. c. 51, s. 16), that facilities for improvement, in which the lord was entitled to share, did not exist in the manor, except in the case of a copyhold tenement escheating to the lord for want of heirs.

3rd. Whether in that manor the lord was entitled to enter for a forfeiture if the tenant dug clay or brick earth?

The assistant commissioner decided that he was not.

4th. Whether in that manor the lord was entitled to enter for a forfeiture for any other kind of waste committed by the tenants?

(1) 15 & 16 Vict. c. 51, s. 16 enacts that "in making any valuation under this act the valuers shall take into account the facilities for improvement, customs of the manor, fines, heriots, reliefs, quit rents, chief rents, escheats, forfeitures, and all other incidents whatever of copyhold or customary tenure, and all other circumstances affecting or relating to the land which shall be included in such enfranchisement, and all advantages to be derived therefrom, and shall make due allowance for the same."

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The assistant commissioner decided, as a question of fact, that he was not.

5th. Whether in that manor the lord was entitled to enter for a forfeiture for any other act of the tenants?

The assistant commissioner decided, upon the evidence adduced, that the manor was ancient demesne.

He also found that the practice or usage of granting leases out of court, and without subsequently presenting them in court, had prevailed for such a length of time and to such an extent, as would have proved an immemorial custom within the manor to that effect if the Cheltenham Manor Act had not been in existence; but he considered that the leasing in question was in contravention of the act, and that a custom to grant leases out of court without presenting them in court could not legally exist concurrently with the system of leasing prescribed by the act.

In regard to the question of forfeiture, the assistant commissioner found that the presentment or survey of the manor given in evidence excluded the existence of forfeiture for any act committed by the tenant; and that the practice within the manor was conformed to that presentment. And the assistant commissioner decided as a conclusion of law arising on the facts so proved, that in that manor the lord was not entitled to enter for a forfeiture for any other act of the tenant.

6th. Whether in that manor the lord was entitled to claim any consideration in respect of any other incident of copyhold, or customary tenure, or any other circumstance or advantage, excepting the rents, fines, and heriots as set forth in the Cheltenham Manor Act, and the surrenders and admittances in pursuance thereof?

Upon this question the only evidence given of any claim having been made by the lord for any consideration in respect of any other incident of copyhold or customary tenure, or any other circumstance or advantage, excepting the rents, fines, and heriots as set forth in the Cheltenham Manor Act, and the surrenders and admittances in pursuance thereof, were in respect of escheat for want of heirs, and two cases of escheat for that cause were shewn in the court rolls; but the lord claimed compensation in respect of facilities for improvement, for his freehold interest in the soil, for

relieving the property from all copyhold incidents attached to copyhold in base tenure, such as fealty of court, reliefs, amercements, forfeitures, royalties, rights of seizure quousque, and for all the incidents and circumstances mentioned in 15 & 16 Vict. c. 51, s. 16, and which the valuers are thereby required to take into account in making any valuation under the act.

The assistant commissioner decided that, upon the legal construction of the act, the lord was entitled to consideration in respect of copyhold tenements escheating to him for want of heirs; and also in respect of facilities for improvement incident to such escheating tenements; and also in respect of the rents, fines, and heriots, as set forth in the Cheltenham Manor Act, and the surrenders and admittances in pursuance thereof; but that the lord was not entitled in that manor to claim any consideration in respect of any other incident of copyhold or customary tenure, or any other circumstance or advantage.

The question for the opinion of the Court was, whether the assistant commissioner had decided correctly, in point of law, on the several questions referred to him.

Mellish, Q.C. (*H. James* and *Sawyer* with him), for the appellant. The principal question is, what is the meaning of the expression "facilities for improvement" in 15 & 16 Vict. c. 51, s. 16? The assistant commissioner thought it was only applicable where, if the tenure continued copyhold, the value of the lord's interest could be increased; as, for example, if the fines or rents might be increased by building or otherwise, or the value of the chance of the property falling into possession by escheat or forfeiture, might be made greater. The appellant contends on the contrary, that if the land will be capable of improvement after enfranchisement in a way which would be impossible if it continued copyhold, the lord is entitled to share in such prospective advantage as a facility for improvement. The lord, it is true, could not obtain any part of such advantage himself, but he could prevent the tenant obtaining it, and he ought to be compensated for the loss of these restrictive powers. If the enfranchisement was voluntary, he could obtain such compensation by refusing to enfranchise unless the tenant paid it; and the assistant commissioner ought to assess the compensa-

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tion, as would be done by a reasonable man for a voluntary enfranchisement. In the present case it is admitted that there are great opportunities for improving the land by building, which cannot be made use of without a larger power of leasing than that allowed by the Cheltenham Manor Act. If, in consequence of this, the tenant would now only obtain twenty-five years' purchase for his land, and after the enfranchisement it will be worth thirty years' purchase, is not the lord to have any share in this increased value which neither could obtain without the other?

[WILLES, J. You say in fact that he ought to be paid for giving up the fee simple, even though he may have derived no advantage from it himself, if it is of value to the tenant.]

Yes. The assistant commissioner on the contrary has found that as the rents, fines, and heriots, are fixed and cannot increase, and there is no forfeiture, the lord is not entitled to any compensation except for the increase of value that might take place in the escheats. The appellant admits that the findings of the assistant commissioner on all other points (questions 1, 3, and 4), except as to forfeiture, are correct.

The arguments on the question of forfeiture are omitted, the Court having expressed no opinion on that point.

H. Mathews, for the respondent. First, there is no forfeiture in the Manor of Cheltenham.

Secondly, the expression "facilities for improvement" occurs first in 4 & 5 Vict. c. 35, s. 28.

[ERLE, C.J. In the act we are now considering (15 & 16 Vict. c. 51, s. 16) the expression is not only "facilities for improvement," but "all other circumstances affecting or relating to the land."]

The circumstances must be such as are "included in such enfranchisement," and what those are appears from section 7, which determines what the valuers have to do. The improvements must be such as could be effected, if the parties chose, on the land at once: the object of the statute being to prevent the tenant lying by and not improving his land, till after enfranchisement, that the lord's share might be as small as possible. In this case the lord could not have gained any advantage from the facilities for building, for he could not have given the tenant power to grant longer leases on payment of an increased fine, the leasing power being limited by

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the act of parliament, not by the will of the lord; and the fines, rents, and heriots being fixed.

[ERLE, C.J. Must not the word "advantages" include the increased value derived from the removal of the restrictions on leasing by the enfranchisement?]

It means the advantages derived from "the facilities of improvement," not from the enfranchisement, *i.e.*, it is the advantages to be derived from what the valuers are to value, and it is not something distinct. It is true "enfranchisement" is the last substantive, but a comparison with section 7, which states what the valuers are to value, shews what the true meaning is. The same interpretation must be given to the words whether the lord or tenant enforces the enfranchisement, and it is obviously unfair that the lord should compel the tenant to pay for a right to grant leases which the tenant has no wish to grant. The appellant's interpretation would introduce far too much uncertainty. It is present and actual, not future possible, facilities for improvement, for which the lord is entitled to compensation.

Sawyer, in reply. Section 7 contains the expression "in manner hereinafter mentioned," which clearly refers to section 16.

Cur. adv. vult.

Nov. 26. The judgment of the Court (Erle, C.J., Willes, Byles, and Keating, JJ.) was delivered by

WILLES, J. We agree with the assistant commissioner as to all the questions (1, 3, and 4) respecting waste. The evidence was abundant to prove a customary right to waste both commissive and permissive; and such right was established to be good in law by the House of Lords in the case of *Lord Salisbury* v. *Gladstone*. (1)

The remaining questions are, whether the act of parliament determines the limits of the customary leasing power, whether the lord of the manor can enter for a forfeiture by conveyance of an estate not authorized by the custom, and whether the lord is entitled to any allowance with respect to facilities for improvement or other like circumstance (beyond those incident to escheating tenements, rents, fines, and heriots) arising out of the fact that the property

(1) 9 H. L. Cas. 692; 34 L. J. (C.P.) 222.

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can be more freely and beneficially dealt with after the enfranchisement than before.

We agree with the assistant commissioner in considering that the custom of the manor as to leasing was determined by the act of parliament, and consequently that subsequent practices inconsistent with the act are insufficient to enlarge the rights therein defined. The act incorrectly describes the tenure as being copyhold, whereas, by reason of the holding being by the custom of the manor only, and not at the will of the lord, it is properly customary freehold. It is clear, however, that the tenure was base, that the freehold was in the lord, and that the proper mode of conveyance (except in the cases provided for in the statute) was by surrender and admittance. The statute was passed for the purpose of settling doubts and disputes; and it laid down the rights of the tenant to lease in the manner there specified for his life and for twelve years or less. It would be to deny it all effect, to say that the limits therein described could be enlarged by mere supineness on the part of the lord or his agent.

As to whether the remedy of the lord, in case the limits of the leasing clause are transgressed, is the ordinary one by forfeiture, or whether that remedy is in this manor excluded by the custom, and the lord may be compelled to resort to some other means of correcting the excess, we desire not to express an opinion, because in one view it might give rise to fresh litigation, and we think it unnecessary for the decision of the substantial questions; and for this reason, that, if the enfranchisement has the effect of enabling the tenant to apply the property to a more beneficial use by means of granting leases more extensive than he could before, and this power practically adds to the value of the estate in his hands, he will have acquired this value by the enfranchisement having freed him from a restraint which would have interfered with the improvement, and which restraint was part of the compact by which he held, and an incident of the base tenure from which he is freed: so that it seems to us unjust to exclude this from consideration simply because the remedy of the lord may be a roundabout and troublesome one, when the right is not disputed.

As to the remaining questions, the assistant commissioner has treated and decided them in effect as questions of law against the

lord's claim in respect of facilities of improvement or other circumstance (save as regards escheats). In our opinion, however, the questions ought not to have been so disposed of: as they are, we think, questions of fact to be decided according to the following considerations, namely, whether the tenant could have availed himself of the facilities for improvement with the powers of transfer which he had before the enfranchisement, or whether he would have been prevented from so doing, either altogether or so beneficially, by reason of his restricted power of leasing. If the latter, then in respect of his being, by reason of the enfranchisement, in a condition to use the land in a more beneficial manner than before, he has gained an advantage; and that advantage has proceeded, not from his estate exclusively, but in part from his having got rid of the dominion of the lord. It is true that the lord could not obtain the enjoyment of this improvement for himself. But he might in the case supposed restrain its free enjoyment by others. It is true that the tenant has the entire usufruct: but the power of free transfer may enhance its value. Extreme cases may be put, as, of a person with power to lease for one year only, whose class of customers would be restricted to those who are contented with a yearly tenancy. On the other side may be put a man who could lease for not more than a thousand years, which would practically be no restriction. As an ordinary illustration may be taken a tenant for life with a short power of leasing of a large vacant plot of land near a town, suitable for building only, and who is not in a condition to grant a building lease, nor has the necessary skill or capital to build. That is not exactly this case, where the whole usufruct is in the tenant, though his leasing powers are restricted: but it furnishes an illustration of the sort of difficulty which the enfranchisement may in fact remove, and in respect of which and the extinguishment of the obstructive right of the lord, if it practically exists and makes a practical difficulty, consideration ought to be had.

We have not overlooked the statement that the lord gave no evidence as to facilities for improvement. But we must read this with the subsequent statement that in fact there were, as to some at least of the land, such facilities.

Whether in respect of the property under enfranchisement the

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circumstances are such that the enfranchisement does practically better the condition of the tenant in respect of his power of availing himself of his facilities of improvement, in other words, whether the land would be worth more in respect of the increased power of improvement, or whether such improvement could have been equally beneficially enjoyed without the enfranchisement, and what is the amount (if any) the lord should therefore have in respect of his parting with the freehold, are in our judgment questions of fact, which must be determined in a great measure by the state of the particular land and other local circumstances. These are questions which we may observe (having regard to the powers of the lord to compel an enfranchisement) require a very cautious consideration. We in no respect mean to bind the assistant commissioner either as to the fact or the amount of this allowance. Our decision is, that the lord's claim, if established in fact, is not by the circumstances mentioned in the case defeated by any rule of law.

We thus answer all the questions except that relating to forfeiture, as to which, for the reasons already mentioned, and by consent of the parties, we pronounce no opinion.

Judgment for the appellant.

Attorneys for appellant: *Meredith & Co.*
Attorney for respondent: *Norcutt.*

[REGISTRATION CASES.]

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Nov. 17

BARLOW, APPELLANT; MUMFORD, RESPONDENT.

Parliament — Borough Vote — Notice of Claim — Insufficient Description of Situation of qualifying Property—Amendment, under 6 *Vict. c.* 18, *s.* 40.

In a notice of claim to a borough vote the situation of the qualifying property was described in the fourth column as "Ely Place." At the revision it was proved that the houses in Ely Place were numbered, and that the claimant's house was numbered 16; and, upon the application of the claimant, the revising barrister amended the claim by adding the number, and inserted the same on the list of voters:—

Held,—confirming the dicta in *Flounders* v. *Donner* (2 C. B. 63),—that the amendment was warranted by s. 40 of 6 Vict. c. 18.

APPEAL from the revising barrister for the borough of Cambridge.

The respondent's name having been omitted by the overseers from the list of voters for the parish of St. Andrew-the-Great, he sent in a claim as follows,—"John Mumford—Ely Place—House —Ely Place,"—and his name was inserted in the list of claimants accordingly.

His name was objected to by the appellant, on the ground that his house had a number, and that the number was not inserted in the fourth column. It was proved that all the houses mentioned in the fourth column were numbered, and that the respondent's house was numbered 16 in Ely Place.

The respondent applied to have his claim amended by the insertion of the number of the house in the fourth column. The appellant contended that the barrister had no power to make the amendment, and that the claim was defective, and must be disallowed.

The barrister decided that he had power to amend the claim, under the 40th section of the 6 Vict. c. 18, inasmuch as in his judgment the qualification, in the absence of the number of the house, was insufficient for the purpose of being identified; and he amended the claim, by inserting the number in the fourth column: and, the respondent having proved to his satisfaction that he had given due notice of his claim to be inserted in the list of voters, and that he was entitled on the last day of July, 1866, to have his name inserted therein in respect of the qualification

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described in such notice of claim, the barrister inserted his name in such list in the form of his notice of claim, with the addition of the number of the house in the fourth column.

The question for the opinion of the Court was, whether the barrister had power to amend the claim and to insert the respondent's name in the list of voters in respect of the amended qualification.

Day, for the appellant. Regard being had to the form of the notice of claim in Schedule B. No. 6, and to the form of the list of claimants in Schedule B. No. 8 to 6 Vict. c. 18, the claimant must set out in the fourth column the "street, lane, or other place" where the qualifying property is situate, and "the number of the house, if any." The question is, whether the revising barrister had any power, under the 40th section of the act, to amend the claim by adding the number where the claim is imperfect by reason of its omission. In *Flounders* v. *Donner* (1), Erle, J., intimates a strong opinion that, if the omission of the number be supplied to the barrister pending the revision, he is bound to amend the description. But the point really *decided* in that case was, that, where a voter's qualification appears in the list to consist of a successive occupation of houses, the number of each, if each has a number, must be stated.

[ERLE, C.J. The opinion imputed to me was also expressed in almost identical terms by Tindal, C.J., and Cresswell, J.]

The provision in s. 40 is as follows:—"And whenever the christian name, or the place of abode, or the nature of the qualification, or the local or other description of the property of any person who shall be included in any such list, and the name of the occupying tenant thereof, shall be wholly omitted, in any case where the same is by this act directed to be specified therein, or if any person whose name is included in any such list, or his place of abode, or the nature or description of his qualification, shall in the judgment of the revising barrister be *insufficiently described* for the purpose of being identified, such barrister shall expunge the name of every such person from such list unless the matter or matters so omitted or insufficiently described *be supplied to the satisfaction of such barrister before he shall have completed the revision of such list*; in which

(1) 2 C. B. 63.

case he shall then and there insert the name in such list." The object of publishing the list of claims and objections is, to give notice of the asserted right of the party to claim or to object: the words "insufficiently described for the purpose of identification" have reference, not to identification in the barrister's court, but at the time the party comes to the poll. Suppose a person bearing some common name, such as John Smith or John Jones, were to describe himself as of "Oxford Street," which is two miles long, so that it would be almost impossible for any person interested to scrutinize the claim, is the barrister, upon the mere assertion of the claimant,—it may be five minutes before the completion of the revision, or in the absence of an opponent,—to insert a number so as to satisfy the requirements of the statute, without affording an opportunity for inquiry? Or, suppose there are two persons named John Jones in Oxford Street, and the houses are numbered alike on both sides, is the barrister to amend by adding "North" or "South?"

[ERLE, C.J. The revising barrister is to be *satisfied*. Mere assertion, in the absence of the opponent, would go for nothing: it would at once be pronounced unsatisfactory.]

Cockerell, for the respondent, was not called upon.

ERLE, C.J. I think the decision of the revising barrister should be affirmed. It appears that the claimant sent in a claim to be inserted in the list of voters for the borough of Cambridge in respect of a "house," that he described himself therein as residing in "Ely Place," and the qualifying property in the fourth column as being in "Ely Place," that the houses in Ely Place are numbered, and that the claimant's number was 16. This claim was objected to as insufficient. The objection is technical, though no doubt the claimant, when before the revising barrister, was bound to prove his qualification, and to satisfy the barrister that he had a right to be upon the register of voters. Now, the house having a number, and the statute requiring the number to be inserted, the question raised is, whether, if the number is omitted, and the claimant gives evidence of the number at the court of revision, the barrister has jurisdiction to insert the omitted matter if supplied to his satisfaction. I am clearly of opinion that the statute does authorize him to insert it. The 40th section intended the sub-

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stance to be adhered to, and that captious objections of form should not prevail. It provides that "the name of every person whose qualification, as stated in any list, shall be insufficient in law to entitle such person to vote, shall be expunged:" and then it goes on to provide, that, whenever the christian name, or the place of abode, or the nature of the qualification, or the local or other description of the property of any person who shall be included in any such list, and the name of the occupying tenant thereof, shall be wholly omitted, in any case where the same is by this act directed to be specified therein, or if any person whose name is included in any such list, or his place of abode, or the nature or description of his qualification, shall, in the judgment of the revising barrister, be *insufficiently described for the purpose of being identified*, such barrister shall expunge the name of every such person from such list, unless the matter or matters so omitted or insufficiently described be supplied to the satisfaction of such barrister before he shall have completed the revision of such list, in which case he shall then and there insert the same in such list." I am very clear that the objection to the sufficiency of the description of the qualifying property in this case was well founded. But I think the claimant had an equal right to say that, if he supplied the number to the satisfaction of the revising barrister, he was entitled to the benefit of that section. If the statute were now to be construed for the first time, I should have held that the amendment was one which ought to be made. It is not as if the original description had been altogether illusory, as if it had been "House in London," or "Land in Middlesex." In that case I should have said the 40th section did not apply. So in the case put by Mr. Day, if the claimant were to come and offer to supply the omission after all parties had left the court, I should give the revising barrister credit for sufficient judicial aptitude to say that the matter was not supplied to his satisfaction, or that the application was so fraught with suspicion that he would not entertain it. Then, how stands the matter upon authority? In *Flounders* v. *Donner* (1), the qualification appeared in the list to consist of a successive occupation of houses, but the number of each not being stated, the description was held to be insufficient. But *all* the Court were agreed that, if the omission of

(1) 2 C. B. 63.

the number had been supplied to the satisfaction of the revising barrister at the revision, he would have been bound to amend under s. 40. That decision was pronounced when the Court was called upon for the first time to put a construction upon this particular provision of the statute. In an earlier page in the same volume of the reports is a much stronger case, viz. *Hitchins* v. *Brown*. (1) There the claimant in the third column stated his qualification to be "house," and in the fourth column he described it thus, "No. 5½, Muck Lane, St. Peter-at-Arches, Lincoln, and previously in the occupation of a house, No. 21, St. Mary Street, in the parish of St. Mary-le-Wigford, Lincoln." His true qualification was "Houses in succession," and not "House." The Court was of opinion that, taking the third column of the notice with the fourth, there was sufficient to justify the revising barrister in amending by inserting in the third column "Houses in succession." (2) That was a much more extensive amendment than was made here. Upon authority, therefore, as well as upon principle, I am of opinion that the revising barrister did quite right in amending.

WILLES, BYLES, and KEATING, JJ., concurred.

Decision affirmed, with costs.

Attorneys for appellant: *Sharpe, Parkers, & Jackson.*
Attorney for respondent: *John Eaden, Cambridge.*

(1) 2 C. B. 25.

(2) But see *Bartlett* v. *Gibbs* (5 M. & G. 81), where it was held that the revising barrister has no power to amend a misdescription of the qualification, where such qualification consists in the occupation of several premises in immediate succession, and some are altogether omitted.

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Nov. 17.

COTTON, Appellant; PRALL, Town-Clerk of Rochester, Respondent.

Akenhead's Case.

Parliament—Borough Vote—Notice of Objection—Variance in Statement of Voter's Abode—Service by Post—6 Vict. c. 18, *s.* 100.

In "the List of Voters for the city of Rochester, in the county of Kent, in respect of property occupied within the parish of Frindsbury," the place of abode of a voter, J. A., was given as "Canal Road, Frindsbury." A notice of objection was sent by post, under s. 100 of 6 Vict. c. 18, addressed "Mr. J. A., Canal Road, Frindsbury, *Rochester, Kent*:"—

Held, that the addition of "Rochester, Kent," did not render the service of the notice bad.

Appeal from the revising barrister for the city of Rochester.

George Cotton objected to the name of James Akenhead on the list for the parish of Frindsbury.

That list was headed, "The list of persons entitled to vote in the election of members for the city of Rochester, in the county of Kent, in respect of property occupied within the parish of Frindsbury."

Akenhead was thus described in the list,—"Akenhead, James—Canal Road, Frindsbury—House—Canal Road."

The notice of objection was in the usual form, and was sent by the post in the manner prescribed by the 6 Vict. c. 18, s. 100, addressed, "Mr. James Akenhead, Canal Road, Frindsbury, *Rochester, Kent.*"

It was objected that this notice was bad, as not in compliance with the statute, in consequence of the addition of the words "Rochester, Kent," to the place of abode of the party objected to as described in the list of voters. The duplicate notice sent by post was not returned. It was admitted that there is a village called Rochester in the county of Northumberland, as well as Rochester in the county of Kent. It was urged in addition, that Rochester in the notice was not identified by the prefix of "city."

The voter did not appear; nor was there any evidence that the notice ever reached him.

For these reasons the barrister held the notice insufficient.

If the Court should be of opinion that the barrister was wrong, the name of James Akenhead was to be removed from the register.

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Prentice, Q.C., for the appellant. By the Boundary Act, 2 & 3 Wm. 4, c. 64, the parish of Frindsbury forms part of the borough of Rochester. The addition of the city and county no more vitiates the notice than if the objector had added "England."

The respondent did not appear.

ERLE, C.J. The decision of the revising barrister must be reversed. The notice of objection clearly cannot be bad for adding the post town in which the voter resides.

WILLES, BYLES, and KEATING, JJ., concurred.

Decision reversed. (1)

Attorney for appellant: *Jesse Nickinson.*

(1) COTTON, APPELLANT; PRALL, RESPONDENT.

FRANKENSTEIN'S CASE.

On "the list of persons entitled to vote for the city of Rochester in respect of property occupied within the parish of St. Margaret, Rochester," the person objected to was entered:

Frankenstein, Leon—St. Margaret, Rochester—House—Cazeneuve Street.

The notice of objection in the usual form was sent by post, under s. 100 of 6 Vict. c. 18, addressed, "Mr. Leon Frankenstein, Cazeneuve Street, St. Margaret, Rochester, Kent."

It was objected that this notice was bad, as not being in compliance with the statute, in consequence of the addition of "Kent."

The rest of the case was in the same terms as the principal case; and judgment was given in it simply as being within the decision of the principal case.

It does not appear from the case that the voter's place of *abode* was in Cazeneuve Street, and a very different question might have been raised: but this point of distinction was not brought in any way to the notice of the Court.

Nov. 17.

PROUDFOOT, APPELLANT; BARNES, RESPONDENT.

Parliament—Notice of Objection, Withdrawal of—6 *Vict. c.* 18, *s.* 40.

Notices of objection having been duly served on certain voters, a notice was published by the objector in the local papers, on the 30th of August, that the objector withdrew his objections; he afterwards sent a notice to each voter that the objection was not withdrawn, but would be proceeded with before the revising barrister. At the revision court the notices of objection were proved, but the voters objected that they ought not to be called upon to support their votes, as the objections had been withdrawn. The revising barrister decided that the objections had been withdrawn, and retained the names of the voters objected to on the list, without proof of their qualification:—

Held, that the revising barrister was wrong: for that, on proof of each notice of objection, he was bound, under s. 40 of 6 Vict. c. 18, to call upon the voter to prove his qualification, and to strike off the name on failure of proof.

APPEAL from the revising barrister for the city of Carlisle. William Proudfoot objected to the name of James Barnes on the list of voters for that city. The notice of objection was dated on the 10th of August, 1866, and it was sent through the post, in the usual manner.

On the 30th of August, Proudfoot, the objector, signed the following notice, which was published in the *Carlisle Patriot* and the *Carlisle Examiner* on the following day:—

"I, W. Proudfoot, of Botchergate, dyer, do hereby withdraw all notices of objection signed by me and sent to parties on the overseers' lists of persons entitled to vote in the election of members for the city of Carlisle; such notices of objection having been signed under false representations made to me at the time. As witness my hand, this 30th August, 1866.

"W. Proudfoot.

"To the conservative electors of Carlisle."

On the 3rd of October, a notice of which the following is a copy was sent through the post to James Barnes:—

"Botchergate, Carlisle, 3rd Oct. 1866.

"Sir,—I hereby give you notice that my objection to your name being retained on the list of persons entitled to vote in the election of members for the city of Carlisle has not been withdrawn, and that it will be necessary for you to attend at the town-hall, Carlisle,

on Thursday the 11th day of October instant, at 12 o'clock at noon, to answer such objection. W. Proudfoot.

"To Mr. James Barnes, Nanson's Buildings, Denton Holme."

It was contended on the part of Barnes that, the notice of objection having been withdrawn, he could not be called upon to support his vote.

It was contended on the part of the objector,—first, that, as he had duly objected in the first instance to the vote of Barnes, he had no power to withdraw his objection,—secondly, that, admitting that he had the power, the notice which appeared in the *Carlisle Patriot* and *Carlisle Examiner* did not amount to a legal withdrawal of the original notice of objection.

Proudfoot also objected to the names of forty one other persons (whose names and qualifications were set forth in a schedule annexed to the case) being retained in the list of voters for the city of Carlisle. The notices to all these persons were signed and duly served on or before the 25th of August, 1866.

The revising barrister decided that the notice of objection to Barnes and the others had been withdrawn, and retained their names on the list,—the cases being consolidated.

If the Court should be of opinion that the decision was wrong, and that the notices of objection were not withdrawn, the names of James Barnes and the forty one other persons who were similarly objected to were to be expunged from the list.

Keane, Q.C., for the appellant. It was not competent to the objector to withdraw an objection once served. The right to object is not a mere *personal* privilege, but is given for the benefit of the public. Where it appears before the revising barrister that a notice has been given, he is bound to expunge the name of the person objected to unless he proves his qualification: 6 Vict. c. 18, s. 40. The duty of the revising barrister is clearly defined; and no subsequent attempt to withdraw the notice can dispense with its performance.

[ERLE, C.J. If no one appears to support the objection, the barrister cannot call upon the voter to prove his qualification.]

Here the objector did appear. Where a public right is concerned, there can be no withdrawal or abandonment. Thus, where

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a writ is served, the plaintiff cannot withdraw it. So, if an appeal be duly entered, the appellant cannot get rid of the liability imposed upon him in respect of it by a mere notice that he abandons it. So, if overseers make a rate, they cannot abandon it by notice. What authority had the barrister here to take upon himself to decide whether or not the notice of objection was withdrawn? The notice to the overseers was not withdrawn, Besides, it is not found by the barrister that the supposed withdrawal was ever delivered to the voter. It was not even addressed to him: and there was no evidence to shew that he was a "conservative elector," or that he ever saw the conservative papers.

[ERLE, C.J. The barrister finds that the notice of objection was withdrawn.]

Only by inference. The barrister is bound to find facts: *Pitts* v. *Smedley*. (1) Public rights are not to be frittered away by private bargains.

Mellish, Q.C. (*Crompton* with him), for the respondent. The merits have not been gone into, and the Court has no power to send the case back to the revising barrister. It would be hard to disqualify forty two voters merely because they have taken a preliminary objection.

[WILLES, J. They have brought the difficulty upon themselves.]

The substantial question is whether a notice of objection can be withdrawn: and that depends upon whether it is strictly a matter of public interest, or a mere matter of litigation between the parties. In general, where a party has power to give a notice he has power to waive it, to save costs, or the like; and there is nothing in the act of parliament to make these notices an exception. The statute throughout treats the objection as a matter of litigation between the objector and the person objected to. No one can be heard before the revising barrister but the objector. He is dominus litis. In the first place, to entitle a person to object, his name must be in the list of voters for the city or borough: s. 17. The barrister can take no cognizance of the objection unless the person objecting "shall appear by himself, or by some one on his behalf, in support of the objection:" s. 40. By s. 41, the barrister is,

(1) 8 Scott N. R. 907; 7 M. & G. 85.

"upon the hearing in open court, finally to determine upon the validity of the objection." The 42nd section enacts that it shall be lawful for any person who shall have made any objection to any other person as not entitled to have his name inserted in any list, and who shall be aggrieved by or dissatisfied with any decision of the revising barrister on any point of law material to the result of such case, either by himself or by some person on his behalf, to give to the revising barrister, in court, a notice in writing that he is desirous to appeal. The provision in s. 46 enabling the revising barrister to award costs in the case of a vexatious or frivolous claim or objection, shews how completely the objector is treated as the master of the litigation; and this is made still more manifest by the very stringent regulations as to costs in the 28 & 29 Vict. c. 36, ss. 8, 14.

[WILLES, J. The 49th section of the 6 Vict. c. 18, looks as if other persons besides the claimant and the objector had an interest in the matter.]

Keane, Q.C., in reply. It is impossible that this could be put higher than the case of a refusal to prosecute an appeal. The overseers are the persons to be appointed respondents in certain cases. That shews that the appeal is a matter in which the public have an interest. The object of the statute is, that the register shall be pure; and this object never can be attained if it be treated as a matter of private litigation.

ERLE, C.J. I am of opinion that the decision of the revising barrister in this case must be reversed. The statute has enabled certain persons to object to a voter's right to have his name upon the register. In the present case, an objector duly qualified gave within the time prescribed by the statute a valid notice of objection, and so entitled himself to be heard before the revising barrister. After the expiration of the time when it would be competent to any other person on the register to object, viz. on the 30th of August, the objector advertised in certain local newspapers that he withdrew his objections; and on the 3rd of October he gave notice to the parties he had objected to that he withdrew his withdrawal, and that they must come prepared to prove their qualifications: and he appeared before the revising barrister and claimed

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to be entitled to insist on the original notice. The barrister decided that he had lost his right as an objector by the notice of withdrawal. Now, we must carefully adhere to the path which the legislature has pointed out to us in this act of parliament. The rights of voters are in some places of intense importance: and we must see that they are not abridged or violated. The duty of the revising barrister at the court of revision is clearly and unmistakably defined in s. 40,—"Where the name of any person inserted in any list of voters shall have been objected to by the overseers or by any other person, and such other person so objecting shall appear by himself or by some one on his behalf in support of such objection, and shall prove that he gave the notice or notices respectively required by this act to be given by him, every such barrister shall then require it to be proved that the person so objected to was entitled on the last day of July then next preceding to have his name inserted in the list of voters, in respect of the qualification described in such list; and, in case the same shall not be proved to the satisfaction of such barrister, such barrister shall expunge the name of every such person from the said lists." In this case the objector shewed that the names of the respondents were duly objected to by him, and he appeared before the revising barrister in support of his objection. That being done, the statute in distinct terms commands the revising barrister to require the qualification to be proved. The barrister did not pursue that course. I find no section in the statute which authorizes the revising barrister, when once a valid notice of objection has been proved to have been given, to inquire whether the objector has withdrawn the objection. I think he had no such jurisdiction; and I think the facts of this case afford a strong confirmation of that view. The rights of voting and of objecting are matters in which the interests of the public are greatly concerned. The objector and the person objected to certainly stand in some respects in the position of litigant parties: but I think it would be to the last degree dangerous to the interests of the public to allow the objection to be withdrawn at the pleasure of the objector. The inquiries, which we have seen recently pending as to the mode of conducting elections in certain boroughs, shew how parties may be acted upon by pecuniary motives. In one sense, no doubt, the objector is dominus litis; for the revising

barrister cannot call upon a person whose name he finds upon the list to prove his qualification unless a notice of objection has been given and an objector appears to support the objection. I am confirmed in the notion that the objection cannot be withdrawn, by the circumstance of the overseer being put in the same position in this respect as any other person objecting: for the overseers, as public officers, certainly could not withdraw. It is matter of great regret that our decision will have the effect of disfranchising no less than forty two persons: but we cannot allow our judgment to be warped by that.

WILLES, J. I am of the same opinion. The 40th section says that, if the person objecting shall appear before the revising barrister, and shall prove that he gave the notice required by the act, the barrister shall require the qualification to be proved. We are here called upon to substitute for the words "shall prove that he gave the notice required by the act," the words "shall abstain from withdrawing the notice he has given," or to add "unless it shall appear to the revising barrister that the objector has previously promised the person objected to that he will not appear." I am at a loss to see how we can so alter the language of the legislature. If the right to object were the party's own private privilege, the rule that a man may waive or abandon a proceeding which is for his benefit might be allowed to prevail. But I think it is impossible to apply that rule to a matter in which the public have an interest. These notices of objection by other persons on the register are but taking up objections which have been overlooked by the overseers. It is no answer to say that the same result may be attained by the objector absenting himself from the revision. The abstaining from supporting the objection at the last moment is a very different thing from the party's being allowed by an advertisement inserted in the local newspapers seven weeks before the revision to strip himself of the right to appear before the barrister, although it is obvious that the persons objected to had no right to be upon the register at all. I must confess I do not feel the least compunction in coming to this decision. It may very well be that the withdrawal of the objection was the result of a corrupt bargain between the parties.

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BYLES, J. I am of the same opinion. When the person who gave the notice assumed the office of objector, he placed himself in the position of a public officer, and cannot of his own mere will divest himself of it. What may be his discretion at the time of the hearing, is not now before us. It may be that the notice would fail if the objector were dead, or incapable of attending by reason of an attack of paralysis or the like. But here the party has no excuse: he gives a notice of objection, and waits until it is too late for any other person to object, and then gives notice that he withdraws his objection. It would be opening a door to fraud to allow this device to prevail.

KEATING, J. I am of the same opinion. I cannot find in the statute any authority for the revising barrister, whose duties are strictly prescribed by the act, to entertain the question whether or not a notice once given has been withdrawn. The reason why no such provision is found in the act may be that the right to object is not a mere private privilege, but a matter of public concern. We cannot get rid of the strict words of the statute. No doubt there may be cases of fraud or deception. I entirely agree with the rest of the Court in thinking that the decision must be reversed.

Decision reversed.

Attorney for appellant: *W. D. Cooper.*
Attorneys for respondent: *Hollings, Sharpe, & Ullithorne.*

MILLS, APPELLANT; COBB, RESPONDENT.

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Nov. 19.

Parliament—County Vote—Apportionment—Cestui que trust in Possession.

Certain freehold lands were conveyed to trustees on certain trusts, amongst others, to pay 5*l.* a year to each of the trustees, which payment was charged upon the whole of the property. Part of the estate, consisting of some woodlands, remained in the hands of the trustees, all the rest of the property being let to tenants. If the 5*l.* payable to each trustee was apportioned between the woodlands and the other lands, the trustees had not 40*s.* per annum each out of the woodlands:—

Held, assuming each of the trustees could be said to be a cestui que trust for life in possession of the woodlands, the charge must be apportioned over the whole estate, and therefore he had not 40*s.* a year out of the woodlands.

APPEAL from the revising barrister for the north riding of the county of York.

The appellant and five other persons, whose names appeared on the register of voters for the township of West Ayton, in the said riding, were objected to.

The nature of the qualification was stated in the third column as follows:—"Cestui que trust in receipt of rents and profits and in possession or occupation of freehold farms and lands;" and the description of the property as follows:—"At West Ayton, partly occupied by Thomas Darrell and others residing at West Ayton."

By several indentures of lease and release of the year 1704, Dame Sarah Hewley conveyed in fee to trustees for certain charitable purposes certain lands, &c., situate in the west riding of the county of York, and known by the name of the Haya Park Estate; and certain other lands situate in the said township of West Ayton, and known by the name of the West Ayton Estate.

By an order of the charity commissioners, dated the 18th of March, 1862, the legal estate in the said Haya Park and West Ayton estates was vested in the appellant and the five other persons whose votes were objected to, who were then and still are the trustees of the charity.

The material trusts, so far as related to this case, were as follows:—"Upon special trust and confidence in them reposed by the said Dame Sarah Hewley, that they the said trustees and the survivors and survivor of them, his and their assigns, and the

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heirs, executors, and administrators of such survivor, shall and will, from and after the decease of her the said Dame Sarah Hewley, pay and satisfy in the first place, out of the rents, issues, and profits of the premises respectively an annuity of 100*l.* per annum issuing or payable to the Lady Brownly; . . . *and also the sum of 5l. a piece yearly and every year to each and every of the trustees for the time being,* and managers for the time being supplying the rooms of deceasing trustees, according to the intent hereof, during all and so long time after the death of the said Dame Sarah Hewley as the same trustees and managers shall be and continue trustees and managers, according to the true meaning hereof respectively."

The rental of the Haya Park Estate is 2085*l.* 14*s.* 2*d.* per annum. That of the West Ayton Estate is 1542*l.* 0*s.* 8*d.* per annum. If the 5*l.* per annum which each trustee is entitled to receive, and actually does receive, under the trusts of the foundation deed of 1704, be apportioned between the two estates in proportion to the yearly rents, issues, and profits derived from each, the proportion payable out of the West Ayton Estate would amount to 2*l.* 2*s.* 2*d.*

The West Ayton Estate includes 116 acres of woodlands of the net value of 54*l.* per annum. The trustees pay the rates and taxes on the woodlands, which are rated at the sum of 34*l.* per annum, and keep the gates and fences in repair. Such timber as is cut on the woodlands is cut by the orders of the steward, who is the servant of the trustees. The eatage of the woodlands is let to one Darrell at 8*l.* a year. There is a gate leading into the woodlands which is locked to prevent trespassing, and the key is kept by Darrell. The remainder of the West Ayton Estate is let to farmers, in the usual way.

If the proportion of the 5*l.* per annum received by each trustee out of the West Ayton Estate is to be apportioned between the woodlands and the other lands in West Ayton, it was admitted that the trustees had not 40*s.* each per annum out of the woodlands alone.

The first objection was, that the qualification of the trustees (if any) was, as owners of a charge on the land; whereas they had claimed as the equitable owners of the land itself; and that the revising barrister could not amend the description.

The revising barrister found that the claimants intended to claim for the qualification (if any) which they possessed under the trust-deed, and decided to amend the description, if necessary, so as to describe the qualification (if any) possessed by the claimants under that deed, provided he had the power to do so; and subject to such proviso, the description of the qualification was to be taken to be amended accordingly.

The following grounds of claim were presented to the revising barrister, on behalf of the claimants:—

"1. The claimants are in actual occupation of the charity estates, within the meaning of the statute 2 Wm. 4, c. 45, s. 18.

"2. They are at any rate in actual occupation of the woodlands, which are (within the north riding) of the annual value of 54*l.*

"3. They obtain the qualification by virtue of their office.

"4. They are at law joint-tenants in fee; and at the same time they are cestuis que trust to the extent of 5*l.* a year for life. They are thus cestuis que trust within the meaning of the 2 Wm. 4, c. 45, s. 23, as explained by the 6 Vict. c. 18, s. 74.

"5. If it be considered that the interests of the claimants is (whether a rent-charge or not) an interest in an annuity, and not a direct interest in the lands, still it is a freehold estate of the clear yearly value of 40*s.*, within the meaning of the 18 Geo. 2, c. 18, and is not interfered with by the 18th section of the 2 Wm. 4, c. 45."

The revising barrister decided as follows:—

"1. That the claimants were not in the actual occupation of any part of the West Ayton Estate except the woodlands.

"2. That they were in the actual occupation of the woodlands as trustees, and not as cestuis que trust; and that, assuming them to be in the actual occupation of the woodlands as cestuis que trust, the sum of 2*l.* 2*s.* 2*d.* received by each of them out of the rents and profits of the West Ayton Estate must be apportioned between the woodlands and the other land not in their occupation,—in which case they would not be in the actual occupation of lands of the annual value of 40*s.* each.

"3. That their appointment as trustees was not a promotion to an office within the meaning of the 2 Wm. 4, c. 45, s. 18.

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"4. That, assuming the trustees to be cestuis que trust, within the meaning of the 6 Vict. c. 18, s. 74, inasmuch as they were only entitled to 5*l.* per annum for life, and were not within the exceptions mentioned in the 2 Wm. 4, c. 45, s. 18, they were not entitled to a vote.

"5. That the 2 Wm. 4, c. 45, s. 18, disqualifies the grantees of annuities and rentcharges for life under 10*l.* per annum, unless they come within the exceptions therein mentioned; and that, assuming the claimants to be grantees of such an annuity or rentcharge, they did not come within the said exceptions."

The names of the appellant and the other five claimants were therefore expunged from the list. The appeals were consolidated.

The question for the opinion of the Court was, whether the claimants were entitled to be registered in respect of any of the grounds of claim above stated: if the Court should be of opinion in the affirmative, their names were to be inserted.

Nov. 17. *Manisty, Q.C.*, for the appellant. The appellant and the other five persons named, being trustees and cestuis que trust in actual possession of a portion of the estate sufficient to satisfy the charge of 5*l.* a year to each of them, are entitled to be registered, by virtue of the provisions in the 2 Wm. 4, c. 45, s. 23, and 6 Vict. c. 18, s. 74; and there is no necessity to resort to the doctrine of apportionment, as there was in *West* v. *Robson* (1), where the value of the lands in the county in which the appellants claimed to be registered was not sufficient to give each of them 40*s.* a year, even if they had been in actual possession. The fact of their filling the two characters of trustees and cestuis que trust can make no difference. Actual possession is not necessary where the charge amounts to 10*l.* a year: and it has been doubted whether even in the case of an interest amounting to 40*s.* a year, actual possession does not mean actual possession of the "tenement," that is, the 40*s.* charge, and not actual possession of the land itself.

T. Chitty, for the respondent. *West* v. *Robson* (1) is a distinct authority to shew that the 5*l.* a year is to be apportioned among the

(1) 3 C. B. (N.S.) 422; 27 L. J. (C.P.) 262: 4 Jur. N.S. 666

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whole estate, and cannot be confined to the woodlands; in which case it is conceded that the charge is insufficient to confer a vote for the north riding. Besides, the claimants are not in possession of the woodlands as cestuis que trust; there are no trusts in the deed to enable them to have possession as such: they are in possession *as trustees*, and that clearly gives them no right to vote. That actual possession of the land is necessary to entitle the party to be registered, is clear from *Anelay* v. *Lewis*. (1) This case is not within any of the exceptions in the 2 Wm. 4, c. 45, s. 18.

Manisty, Q.C., in reply. The claimants are not less in possession of the woodlands as cestuis que trust because they happen to be trustees also. Assume that the trust was, to pay the 5*l.* a year to strangers, there being enough issuing out of the woodlands to satisfy the charge, can it make any difference that resort *may* be had to a larger area to make up the 5*l.* a year, if necessary?

Cur. adv. vult.

Nov. 19. ERLE, C.J. I am of opinion that the decision of the revising barrister should be affirmed. The question is, whether the claimant had a qualification which entitled him to vote. Several objections were raised; but there is one which induces me to affirm the decision, and that is, that the claimant had not 40*s.* a year issuing out of freehold lands in West Ayton. The appellant's title was derived from a grant of land by Lady Hewley, by which and by certain acts of the charity commissioners the land became vested in the appellant and five others as trustees. The land was worth several hundreds a year; and out of the rents and profits the trustees were, amongst other things, to pay to themselves 5*l.* a year each. All the land was let, with the exception of certain woodlands in West Ayton of the net yearly value of 54*l.*; and out of this the appellant professed to pay himself and his co-trustees the 5*l.* per annum each. He therefore claimed to have more than 40*s.* a year issuing out of those woodlands in West Ayton. But I am of opinion, that, if a person is the owner of a rentcharge of 5*l.* a year issuing out of certain lands, he has no right to say that it issues out of one portion only of those lands, in order to give himself a right to vote. I therefore think the claim fails in point of

(1) 17 C. B. 315; 25 L. J. (C.P.) 121.

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value; and I do not think it necessary to go into any of the other questions raised in the case.

WILLES, BYLES, and KEATING, JJ., concurred.

Decision affirmed.

Attorneys for appellant: *Vizard, Crowder, Anstie, & Young.*
Attorney for respondent: *Henry Smith.*

Nov. 20.

THACKWAY, APPELLANT; PILCHER, RESPONDENT.

Parliament—Borough Vote—Notice of Objection—Description of Objector's Place of Abode—6 Vict. c. 18, *s.* 17.

4 C.B. 415. 420

It is a question of fact for the revising barrister whether the description of the place of abode of the objector in a notice of objection is sufficient. Where the description is such, that a letter so addressed would reach the objector by post, and the person objected to could easily find him by inquiry on going to the place stated, it is sufficient.

APPEAL from the revising barrister for the city of Hereford.

Charles Henry Pilcher objected to the name of William Thackway, on the list of voters for the city of Hereford. The notice of objection had been duly served on the voter, and was signed, "Charles Henry Pilcher, of Bartonsham, on the list of voters for the parish of St. Owen."

The place of abode of the objector stated in the list of voters of the parish of St. Owen was Bartonsham.

It was proved that there was formerly in the parish of St. Owen a farmhouse and farm, called "Bartonsham," and this farmhouse still existed, and was occupied as such with a large portion of the land, all of which was still called "Bartonsham."

A portion of the land, formerly occupied with the same farm had of late years been laid out in building allotments; and within the last few years streets had been formed, and houses built there, and the whole district was known as Bartonsham; and the district so known consisted of four streets, some houses or blocks of houses within which had been distinguished by their owners as terraces, places, or villas, and there were altogether forty two such terraces, places, or villas.

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The objector lived at 1, Argyle Place, Green Street, which was in the district known as "Bartonsham."

It was objected that "Bartonsham" was too general a description of the place of abode of the objector, and that the description should have been "Green Street," or "1, Argyle Place."

It was admitted, and the barrister was satisfied, that a letter addressed "Charles Henry Pilcher, Bartonsham," and placed in the post-office, would have reached the objector; and that the voter could, by going to Bartonsham and making inquiries there, have easily found out the house in which the objector resided, although he would not have found the house so easily by only knowing that the objector's residence was in the district called Bartonsham, as he would if he had known that it was in Green Street, Bartonsham, or at 1, Argyle Place, Bartonsham.

The revising barrister held the description of the abode of the objector sufficient, and struck the name of the voter, who did not appear to prove his qualification, off the list.

W. H. Cooke, Q.C. (*Griffits* with him), for the appellant. The question is, whether the place of abode of the objector is sufficiently given. It is not enough to give only the district; "Pimlico" or "Islington," for example, would be clearly insufficient. A letter will often reach its destination with a very imperfect direction. The person objected to is not bound to go to the spot to make inquiries, in order to find out the objector's residence. The case nearest in point is *Woollett* v. *Davis* (1), in which the residence of the objector, as given in the list of voters, was held an insufficient description in the notice of objection.

H. James, for the respondent, was not called upon.

ERLE, C.J. I think the decision of the revising barrister should be affirmed. The objector stated in his notice of objection his place of abode as "Bartonsham." His place of abode given in the list of voters was Bartonsham; and in *Gadsby* v. *Warburton* (2) the Court refer to that as a means of judging of the sufficiency of the description of the place of abode in a notice of objection. But putting our decision on wider grounds, I think it is a question

(1) 4 C. B. 115; 16 L. J. (C.P.) 185. (2) 7 M. & G. 11; 14 L. J. (C.P.) 41.

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of fact for the revising barrister, whether the description of the objector's place of abode is sufficient. In this case there was originally only one farm, of which Bartonsham was a perfectly sufficient description; and though it is now changed, yet it still forms a distinct district, and is known by the name of Bartonsham. The revising barrister, in effect, finds that the description of the objector's place of abode was such that the person objected to could easily have found the objector if he had gone to the place described, and the description was, I think, sufficient.

WILLES, BYLES, and KEATING, JJ., concurred.

Decision affirmed.

Attorneys for appellant: *Hancock, Saunders, & Hawksford.*
Attorneys for respondent: *Marshall, Westall, & Co.*

Nov. 20.

BRIGHT, APPELLANT; DEVENISH, RESPONDENT.

Parliament—Borough Vote—Notice of Objection—Description of List on which Objector appears—6 *Vict. c.* 18, *s.* 17.

4 C.P.462

In a notice of objection to a borough voter, the objector was described as "on the list of voters for the parish of P.;" his name was not on the list of occupiers for that parish, but it was on the list of freemen, and in that list he was described as residing in the parish of P.:—

Held, that the notice was bad.

Tudball v. *Town Clerk of Bristol* (5 M. & G. 5) affirmed.

APPEAL from the revising barrister for the borough of Maldon.

William Devenish objected to the name of Edward Bright on one of the lists of voters for the borough.

There were five lists of voters for the borough of Maldon, viz. a list of the freemen of the borough, comprising all freemen residing within the borough or within seven miles thereof; the list of occupiers for the parish of St. Peter, Maldon; and three similar lists of the occupiers for the three other parishes in the borough.

The name of the objector was duly inserted and published in the freemen's list thus: "Devenish, William, St. Peter, Maldon," but his name was not in the occupiers' list for the parish of St. Peter.

Under the signature of William Devenish to his notice of objec-

tion were the words "Fullbridge Street, St. Peter, Maldon," "on the list of voters for the parish of St. Peter, in the said borough."

It was objected on behalf of the voter that the notice of objection was insufficient, because it did not state that the objector was on the list of freemen.

The revising barrister held the notice of objection was sufficient, and, the voter's qualification not being supported, struck the name off the list.

A. Wills, for the appellant. The precise point has been already decided in the case of *Tudball* v. *Town Clerk of Bristol* (1), and that case has been alluded to without disapproval in subsequent cases, such as *Wansey* v. *Perkins* (2), *Eidsforth* v. *Farrer*. (3)

[He was then stopped by the Court.]

W. H. Cooke, Q.C., for the respondent. The decision in *Tudball* v. *Town Clerk of Bristol* (1) is unsatisfactory. It was one of the earliest cases decided on the statute, and as there is no appeal from this Court it ought to be reconsidered. The Reform Act (2 Wm. 4, c. 45, s. 47), did not require any notice to be given to the voter, nor that the list of voters on which the objector's name appeared should be stated in the notice given to the overseers. The object of the later statute, 6 Vict. c. 18, s. 1, was to save the overseers trouble, not to give any essential information to the person objected to. The 17th section says that the notice to the overseers shall be given "according to the form numbered 10 in the said schedule B, *or to the like effect*," but the latter words do not occur where the form No. 11 is mentioned, and the objector was therefore right in following the exact words of the form given in the statute. The list of freemen is really a list of voters for the parish as respects those who live in it, though not technically called so; and in *Samuel* v. *Hitchmough* (4) the Court held the notice of objection sufficient where the objector stated he was on the list of voters for the parish of P., though there were two lists for that parish—one of 10*l.* occupiers and the other of the reserved rights.

[BYLES, J. In this case there is a list to which the description

(1) 5 M. & G. 5; 13 L. J. (C.P.) 49.
(2) 7 M. & G. 127; 14 L. J. (C.P.) 60.
(3) 4 C. B. 9; 16 L. J. (C.P.) 132.
(4) 13 C. B. (N.S.) 3; 32 L. J. (C.P.) 55.

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given accurately applies, but to the list on which the voter's name appears the description given does not accurately apply.]

ERLE, C.J. *Tudball* v. *Town Clerk of Bristol* (1) is precisely in point, and we see no reason to dissent from it.

WILLES, BYLES, and KEATING, JJ., concurred.

Decision reversed.

Attorneys for appellant: *Digby & Son.*
Attorney for respondent: *H. Codd, Maldon.*

Nov. 20.

HINDE, APPELLANT; CHORLTON, RESPONDENT.

Parliament—County Vote—40s. Freeholder—Pew in Parish Church—Easement —8 Hen. 6, c. 7—2 & 3 Wm. 4, c. 45, s. 18—5 Geo. 4, c. lxiv.

By a private act, 5 Geo. 4, c. lxiv., trustees were appointed to pull down and rebuild on an enlarged site the parish church of O., and to enlarge the burying ground attached to it. By s. 22 all the materials of the old church, and all the fences, &c., of the churchyard, and all the materials that might be collected by the trustees for rebuilding the church, or making new fences, &c. to the churchyard, were vested in the trustees, and it was provided that in bringing actions or preferring bills of indictment against persons injuring the church or stealing the materials, it should be sufficient to state that the church or materials were the property of the trustees. By s. 24 the rector of the parish and his successors were to be rectors of the new church, and by s. 27 the new church was to be to all intents and purposes the parish church of O. By s. 30 the trustees were required to allot pews and seats in the new church to persons who had been entitled to pews or seats in the old church; and it was provided that such new pews or seats should be held by such persons, their heirs, executors, administrators, successors, and assigns, in the same and in as full and ample a manner as the pews or seats in lieu of which they were allotted had been held by them. By s. 31 the trustees were empowered to sell the fee simple and inheritance of such of the pews in the body of the church as were not otherwise appropriated in pursuance of the act to any persons being inhabitants of the parish; and it was provided that, on the execution of the conveyance thereinafter directed of any pew so sold, such pew should be vested in the purchaser, his heirs and assigns for ever, and might thereafter be sold, conveyed, devised, or otherwise parted with, by the proprietor for the time being, to any other person being an inhabitant of the parish, subject only to the rules, regulations, rates, or impositions to which such pew or its owner might be or become liable in pursuance of the act; and it was further provided that it should not be lawful for any owner of any such pew

(1) 5 M. & G. 5; 13 L. J. (C.P.) 49.

to sell, convey, let, assign, devise, dispose of, or bequeath the same to any person not being an inhabitant of the parish, and that when any owner of any such pew should die, and such pew should not thereupon descend and go to some person being an inhabitant of the parish, then such pew should descend and go to the trustees and be vested in them, and might be let or sold by them as hereinbefore provided, or in case the functions of the trustees should have ceased, then such pew should go to the churchwardens of the parish, who should let or sell it in the manner and subject to the provisions before mentioned. In s. 32 a form of conveyance was given, in which the trustees granted, released, and conveyed to the purchaser, his heirs and assigns, the pew, and all their right, title, and interest in it. The trustees sold under the act a pew in the body of the church to an inhabitant of the parish, who sold it to another parishioner, A. A. did not occupy the pew by himself or his family, but let seats in it to other parishioners, and received for them more than 40*s.* a year :—

Held, that under the act A. had not acquired the freehold of the pew, but only a right to sit in it to hear divine service, and that such a right was in the nature of an easement, and therefore not a tenement within the meaning of 8 Hen. 6, c. 7.

Held, also, that supposing A. to be possessed of the freehold, his estate was of the nature of a life estate, and within the provisions of 2 & 3 Wm. 4, c. 45, s. 18; and that A., therefore, as he did not occupy it himself, or receive 10*l.* a year for it, was not entitled to a vote for the county in respect of his interest in the pew.

APPEAL from the decision of the revising barrister for the southern division of the county of Lancaster.

Frederick Clayton duly objected to the following claim to be entitled to vote in respect of property within the parish of Oldham:—

Name of the Voter.	Place of Abode.	Nature of Qualification.	Street, Lane, or other like Place, &c., or Name of the Property, &c.
Bamford, John .	Waterloo, Oldham.	Freehold pew.	No. 33, centre aisle, Oldham parish church.

The pew was in the body of the church or parochial chapel-of-ease of Oldham, within the parish of Prestwich-cum-Oldham, which had been rebuilt under a local act, 5 Geo. 4, c. lxiv.

By that act, after reciting that the ancient parochial chapel-of-ease of Oldham, in the county of Lancaster, and the tower thereof, were by lapse of time become very ruinous, that the said church was not sufficiently large for the accommodation of the inhabitants of the chapelry of Oldham, and that the cemetery adjoining the

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church required to be enlarged; that it was therefore expedient that the body of the church and the tower should be taken down, and in lieu thereof a new church, on an extended site, and of larger dimensions, should be erected, a new tower thereto erected, or the present tower thereto raised, repaired, and altered, and the present cemetery enlarged: and after reciting further that the rector of Prestwich-cum-Oldham was patron of the said church of Oldham; it was enacted by s. 1, that the rector of Prestwich-cum-Oldham for the time being, the curate and churchwardens for the time being of the said church of Oldham, together with certain other persons, should be trustees for carrying the act into execution. The trustees were empowered, by s. 20, to pull down the body of the then present church; and by s. 21, to enlarge the site of it, and to rebuild it of larger dimensions, and with additional galleries, in the same situation, and to erect and set up (inter alia) such pews and seats as to them should seem right and proper. By s. 22, all stones, bricks, and other materials of the then present church, and all materials that might be purchased for the new church, and all the fences, gates, and other appurtenances to the churchyard, were vested in the trustees; and it was provided that it should be lawful for the trustees, or any three of them, to bring actions, or cause bills of indictment to be preferred against, any person who should injure the church and tower, or any part of them, or should steal any of the materials; and that in all such actions and bills of indictment it should be sufficient to state generally that the church, tower or materials were the property of the trustees for taking down and rebuilding the ancient parochial chapel-of-ease of Oldham, without specifying the names of any of the trustees.

By s. 24, the then rector and his successors, rectors for the time being of the parish of Prestwich-cum-Oldham, were to continue to be the rectors of the church to be rebuilt by virtue of the act, in like manner as of the old church; and by s. 27, the body of the church to be rebuilt by virtue of the act was to be to all intents and purposes the church of the parochial chapelry of Oldham. By s. 30, the trustees were required, when the body of the church should have been erected and completed, and such pews or seats as were intended to be erected therein, or in the galleries thereof,

should have been finished, to allot and appoint an equal number of pews or seats therein to the several proprietors or persons who at the time of such allotment or appointment respectively would have been entitled to pews or seats in the then present church, or the galleries thereof, or in the actual receipt of the rents and profits thereof. And it was provided that all the new pews or seats which should be so set out or allotted to the several proprietors or persons so entitled to pews or seats in the then present church, or the galleries thereof, should be held and enjoyed by such proprietors or persons, their heirs, executors, administrators, successors, and assigns, in the same, and in as full and ample a manner as the then present pews or seats in lieu of which such new pews or seats should be so set out or allotted, were or ought to have been held and enjoyed respectively.

By s. 31, the trustees were empowered to let or sell any pew which had not been appropriated under the previous provisions of the act. (1)

(1) The section (31) is in the following terms: "It shall be lawful for the said trustees from time to time, either by public auction or private contract, to lease or demise such or so many of the said pews or seats in the body of the said church (not otherwise appropriated in pursuance of this act) as to them shall seem meet, for any term or number of years, not exceeding three years, to any person or persons, being inhabitants of or residents within the said parochial chapelry of Oldham, willing to take the same pews or seats respectively, and at any time or times (subject to any such lease or demise) to sell and dispose of the fee simple and inheritance of the same pews or seats, or any of them; and also to sell and dispose of the fee simple and inheritance of such or so many of the said pews or seats in the body of the said church as shall not be leased or demised, as they the said trustees shall think fit, unto any person or persons, being inhabitants of or residents within the said parochial chapelry of Oldham, willing to take or become the purchaser or purchasers of the same pews or seats respectively; and every such lease or demise as shall be made in pursuance of this act, being signed by three or more of the said trustees, and by the lessee or lessees of such pews or seats, shall be good, valid, and effectual to lease and demise such pews or seats respectively, to such inhabitants or residents, without any faculty or other instrument whatsoever, and shall be received as evidence in all causes, suits, and actions touching or concerning any such lease or demise; and from and immediately after the execution of such conveyance as is hereinafter directed of such pews or seats as shall be sold as aforesaid, all and every such pews or seats shall be vested in the purchaser or purchasers thereof, and his, her, or their heirs and assigns for ever, and shall and may thereafter be sold, conveyed, devised, or otherwise parted with or disposed of, by the proprietor or proprietors thereof for

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In s. 32, a form of conveyance, to be used by the trustees on the sale of a pew, is given, which purports to grant, release, and convey, to the purchaser, his heirs and assigns, the pew, and all the right, title, and interest, of the trustees to and in the same, to hold the same to the purchaser, his heirs and assigns, for ever.

The case then stated that the pew in question had been sold and conveyed for a valuable consideration by the trustees to an

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the time being, unto any other person or persons, being inhabitants of or residents within the said parochial chapelry of Oldham, subject only to the payment of the rent or rents reserved or made payable for or in respect of such pew or seat, pews or seats, and to the rules, regulations, rates, or impositions, to which the same pew or seat, pews or seats, or the owner or proprietor, owners or proprietors, thereof for the time being shall, or may be, or become subject or liable in pursuance of this act; and it shall not be lawful for any purchaser or purchasers, or any owner or owners, of any such pews or seats, so to be sold by virtue of this act, to sell, convey, let, assign, devise, dispose of, or bequeath the same to or for any person or persons not being an inhabitant of or resident within the said parochial chapelry of Oldham, but all such last-mentioned sales, conveyances, leases, assignments, devises, and bequests, if any, shall be null and void; and when any purchaser or owner of any such pew or seat sold or conveyed, assigned, or leased, or demised, by virtue of this act as aforesaid, shall die, and such pew or seat shall not thereupon descend or go to some person being an inhabitant or resident within the said parochial chapelry, then every such last-mentioned pew or seat shall in such case descend or go to the trustees acting in the execution of this act, and be vested in them, and shall and may be let or sold by them in manner herein provided respecting the leasing and sale of pews; or in case the functions of the said trustees for executing this act shall have ceased, then such pew or seat shall descend or go to the churchwardens of the said parochial chapelry, and shall be vested in them, and shall and may be by them, or any three or more of them, let or sold and conveyed to any such inhabitants or residents aforesaid, and subject to the same or the like provisions as are herein made relative to the letting and sale of pews; . . . and all the moneys to arise by or from such leases, demises, sales, and conveyances, shall be applied for the purposes of this act; and in case the rent reserved upon any such lease or demise shall be behind or unpaid after the same shall become due, and shall have been demanded at the last known place of residence of the lessee or occupier thereof, it shall be lawful for the churchwardens for the time being of the said parochial chapelry, and they are hereby authorized and required to enter upon and take possession of such pew or seat for and on behalf of the said trustees, and the said trustees may let or sell the same to any other person or persons being inhabitants of or residents within the said parochial chapelry of Oldham; and all moneys to be received by the said churchwardens as aforesaid shall be by them applied for or towards the same purposes as the church-rates for the said parochial chapelry are applied. . . ."

inhabitant of the chapelry, of whom the claimant, also an inhabitant of the chapelry, had purchased it. The claimant did not occupy the pew by himself or his family, but let sittings therein at rents or payments varying from 10s. to 15s. per annum, to various persons, mostly inhabitants of the chapelry, but some not. The rents or payments thus received by the claimant for the pew exceeded 40s. a year from inhabitants of the chapelry.

No evidence was adduced that before the passing of the act the soil and freehold of the body of the old church, or of the site of the new church, which was the same as that of the old, was in any other person than the rector of the parish, and the revising barrister found that such soil and freehold still remained in him, unless the act and the conveyances of the pew had the effect of divesting the soil and freehold of that portion of the church whereon and whereof the pew stood and consisted, out of the rector, and vesting the same in the claimant.

On behalf of the claimant, it was contended,—first, that the portion of the church itself of which the pew consisted was land, and that a base fee simple therein was vested in the claimant by virtue of the grant under the powers of the act of parliament from the trustees, among whom were the rector of the parish and the curate of the parochial chapel; secondly, that if not land, the pew, and the rents or payments for sittings therein, must be considered a free tenement, as being a profit arising out of the land, and therefore within the meaning of the 8 Hen. 6, c. 7, and entitling the claimant to vote.

On the other hand, it was contended by the objector,—first, that the soil and freehold of the whole body of the church still remained in the rector or curate, and that the grant by the trustees under the statute conveyed no other right or interest in any part of the site or fabric of the church than did the allotment of a pew in a parish church to a parishioner for the use of himself and his family by virtue of a faculty; secondly, that the right to, or property in, such pew or seat so granted or conveyed, such pew or seat not being appurtenant to any house, was only an easement, and therefore no qualification, and that the claimant had not, under the act of parliament before referred to, any further or greater, power right, or property, in such pew or seat, than had he or would have

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had previously by the common law; and, thirdly, that the claimant's interest in the pew could not be considered a free tenement within the meaning of the 8 Hen. 6, c. 7, because it was not a right to any profit of the land, but, at most, only the easement for the claimant and his family to sit in the pew during divine service, with the statutory power of transferring the enjoyment of that easement for a valuable consideration, either for ever, or for a term of years, to any other inhabitants of the parish.

The revising barrister was of opinion that the claimant had a freehold interest of inheritance, in the nature of a base fee, in the pew, and that he, in fact, lawfully derived above 40s. a year therefrom, but that the soil and freehold of the whole body of the church still remained in the rector, and, consequently, that neither the said pew, nor the claimant's interest therein, was his free land; he was also of opinion that the claimant's right and interest in the pew was not a free tenement within the meaning of the statute of 8 Hen. 6, c. 7, but only an easement similar to a pew enjoyed by virtue of a faculty by an inhabitant in the body of any parish church, transferable, indeed, to other inhabitants of the chapelry under the provisions of the act, without any faculty being necessary.

The revising barrister therefore disallowed the claim, and erased the claimant's name from the list.

Joshua Williams, Q.C., for the appellant. This claim depends entirely on the wording of the act of parliament (5 Geo. 4, c. lxiv). In ordinary cases, the right to a pew is a mere easement, and is attached to an ancient tenement, but in this case the pew is held under the authority of the act of parliament, apart from any tenement, and the question is, in whom the freehold of the pew is vested under the operation of the act.

The first effect of the act is to vest the freehold of the whole church in the trustees appointed by it, and it is thus taken out of the rector, in whom, by the common law, the freehold of the church usually resides. This is done most expressly, the timber and other materials being vested in the trustees by s. 22, and they being empowered to bring actions or prefer bills of indictment in case of injury to the church or such materials; and it is provided

that it shall be sufficient in all such actions and bills of indictment to state generally that the church, &c., is the property of the trustees. It is true the trustees are not expressly incorporated, but they are so by implication, the powers and duties conferred on them being such as can only belong to a corporation. That a corporation may be so created by implication was decided in *Conservators of the River Tone* v. *Ash* (1), and *Ex parte The Newport Marsh Trustees.* (2)

Then, by s. 31, the trustees are empowered to sell the fee simple of the pews, and s. 32 gives a form of conveyance by which they grant all their right, title, and interest in the pew to the purchaser and his heirs. The purchaser then becomes the actual owner of the freehold of the pew, subject to such restrictions as are imposed by the act.

[WILLES, J. Could the purchaser use the pew for any purpose he chose, such as living or sleeping at night in it?]

He would be subject in this to the restrictions imposed by the rules made for the regulation of the church; moreover, s. 27 makes the new church to all intents and purposes a parish church, and the laws enforcing the decent use of churches would therefore be applicable to it.

The appellant, if possessed of the freehold, is clearly entitled to vote in respect of the pew, though it is not a separate building. In a case before the Bedfordshire Committee (3) a voter was held entitled to vote in respect of a windmill, standing upon a post, though it was not proved that the ground beneath it belonged to him; and the claim of the bedesmen of Burleigh Hospital to vote in respect of their rooms, upheld in *Roberts* v. *Percival* (4), was very similar to the present. In Elliot on Registration, p. 38, it is said that though pews in churches will not usually give a right to vote, they may, under certain modern acts of parliament for rebuilding churches, and *Mainwaring* v. *Giles* (5) is referred to. If this act does not vest the freehold of the pews in the purchasers it must create an easement in gross to be held by a man and his heirs, a species of interest unknown to the common law: *Ackroyd*

(1) 10 B. & C. 349.
(2) 16 Sim. 346; 18 L. J. (Ch.) 49.
(3) 2 Lud. 440.
(4) 18 C. B. (N.S.) 36; 34 L. J. (C.P.) 84.
(5) 5 B. & Ald. 356.

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v. *Smith*. (1) The right of re-entry shews, too, that the trustees, after the sale, have not possession of the pew; and the lessee is called an occupier, though an easement cannot be "occupied." By 8 Hen. 6, c. 7, the voter is required to have free land or tenement to the value of 40*s*. by the year. This pew is a tenement, because it is held by the appellant to himself and his heirs under the authority of the act of parliament, and it is, moreover, a corporeal tenement because it produces profit by letting like a house or land, and that profit is found by the case to amount to more than 40*s*. a year. The appellant, therefore, is entitled to his vote.

Mellish, Q.C. (*Holker* with him), for the respondent. The principal question is, whether the act vests the freehold of the pews in the trustees, or only the right of sitting in the pews during divine service, which is in the nature of an easement. At common law no one can have a right to a pew in the body of a church except as an easement attached to a house: *Mainwaring* v. *Giles* (2); Watson's Clergyman's Law, p. 391. It is true that the lord of the manor may sometimes have the freehold of a pew or aisle; but this is on the supposition that his ancestors built the church, and reserved the pew or aisle out of it to themselves, so that it does not really form part of the church: *Churton* v. *Frewen*. (3) In any view, therefore, the act creates an estate unknown to the common law; and the Court will not in this case lean in favour of the voter, because if the estate really confers a vote that will hinder instead of promoting the object of the legislature, which was to provide accommodation for the parishioners attending divine service, since it will increase the value and rental of the pews. Great inconvenience would result if the freehold in the pews were vested in the purchasers. In that case ejectment might be brought, and the sheriff be required to deliver possession of the pew. The owner, too, might have it of what height or colour he pleased. An examination of the statute, however, shews that it has no such effect. The church was an ancient one, and the freehold was in the rector at the time of the passing of the act. So far from the act anywhere taking this freehold out of the rector, and vesting it in the trustees, which could have been done by two

(1) 10 C. B. 164; 19 L. J. (C.P.) 315. (2) 5 B. & Ald. 356.
(3) Law Rep. 2 Eq. 634.

lines, there is, in s. 22, an enumeration of the materials of the old church at great length, which are then vested in the trustees, but evidently as chattels, and the stiles and other fixtures in the churchyard are specially vested in the trustees, which would have been unnecessary if they possessed the freehold of the churchyard. Section 30 requires the trustees to allot seats in the new church to those persons who were entitled to seats in the old church, and very similar words are used with respect to them to those used in the next section with respect to seats to be let or sold by the trustees, and yet it is said that "the new pews or seats . . . shall be held or enjoyed by such proprietors, their heirs, executors, administrators, and assigns, in the same and in as full and ample a manner as *the present pews or seats*, in lieu of which such new pews or seats shall be so set out or allotted, are or ought to be held and enjoyed respectively," and the freehold of the pews in the old church was certainly not vested in the proprietors, who had only a right to sit in them. The 31st section provides for the time when the functions of the trustees shall have ceased, which could hardly be the case if the freehold of the church was vested in them, and it also uses the expression "without any faculty," which implies that the object of the act was to enable the trustees to do the same thing which could be done by a faculty, and a faculty does not pass the freehold, but only gives a right to sit in a seat.

[WILLES, J. The act speaks of the *right* to the pew, which means the right to sit in the pew during divine service.]

The words of the conveyance in the 32nd section will be quite satisfied if it was such a right which it was intended should be conveyed. No doubt words like "fee simple" and "re-entry" are used, which are not strictly appropriate, but they are not to be taken in their exact technical sense, but with reference to the subject matter. The appellant's interest in this pew, therefore, is not a tenement, for that term does not include a right to an easement: it does include a profit á prendre (1), but the only profit derivable from a right to sit in a pew is one of which the ecclesiastical courts only will take cognizance, and in the eye of the common law such a right is only in the nature of an easement.

Joshua Williams, Q.C., in reply.

(1) Co. Litt. 6 a.

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ERLE, C.J. I am of opinion that the decision of the revising barrister was right, and that the proprietor of a pew in this church did not acquire any right to vote by reason that the pew was worth more than 40s. a year. The question is, whether the statute under which the church was rebuilt was intended to create a freehold tenement within the meaning of the statute 8 Hen. 6, c. 7. I think it was not. The purpose of the statute is to raise the funds required for the pulling down and rebuilding the church, and many rights are no doubt created by it, on which ecclesiastical considerations have much bearing, and which depart very widely from the principles of the common law: but we have to gather from the whole statute what its meaning is. Now, by s. 24 the rights of the rector are expressly reserved, and it is declared that he shall continue to be rector of the new church in like manner as in the old one. Undoubtedly the freehold of the old church was in the rector, and therefore this section amounts to an express provision that the freehold of the new church shall be in him.

The sections vesting the materials of the old and new fabrics in the trustees are to be viewed in relation to the object of the act, and were intended to enable the trustees to deal with those materials, and to protect them from theft; it would be contrary to the whole tenor of the act to suppose that they were intended to transfer the freehold from the rector to the trustees. Though the trustees had not the freehold, they had a right to the pews, and under the powers of s. 31 they granted a pew to the claimant, and it is said that this cannot be an easement because it was granted to the claimant and his heirs, and that therefore it must be a tenement. I think, however, that the grant of the pew only gave a right to use that part of the church for attending divine service, and nothing more. On this point s. 30 seems to me conclusive, for by that section it is provided that the proprietors of pews in the old church are to have the same rights in their pews in the new church as they had in their pews in the old church, only for a longer period; and it is certain that they had no other right than that which I have named in their pews in the old church. I think that the grant of pews under s. 31 would convey the same rights only as were possessed in their new pews by those who had

been proprietors of pews in the old church. A much longer interest is created than is known to the common law, and there was a good reason for this, because many persons might be willing to give a larger sum of money for the right to hold a pew without the liability to have it taken away from them than for the use of it from year to year, but I think the nature of the right is the same as in other cases. Moreover, the claimant certainly did not possess the fee simple in the pew, since it was limited to the grantee and his heirs *so long as they were parishioners*, and the grant was to become null and void if he or his heirs ceased to be parishioners.

WILLES, J. I am of the same opinion. The effect of the act is not to create a new pew-right, except in one particular. Its object was mainly to enable the trustees to do what had been previously done by the bishop when he granted a faculty in a pew to a man and his family as long as they remained parishioners, only that in the case of the bishop no common law right was given. Such a faculty by the bishop was not a mere license, for it was not revoked except the circumstances were such that it caused very great inconvenience to the rest of the parishioners. No doubt the present statute gives the additional power that the pew could be transferred to another parishioner on the same conditions; but I am satisfied, from s. 30, that the new proprietors have no other right beyond that of the old pew-holders in the old church, and the latter certainly had not freehold interests in the pews. The language of ss. 31 and 32 appears to me to be satisfied by holding that they gave a right to the trustees to grant, not the soil and freehold of the pew, but the right to the pew, that is to say, the right to use the pew for the purpose of hearing divine service whenever it was celebrated in the church. The language of the section is, in fact, appropriate to the conveyance of a pew-right, not a land-right; and the expression "pew or seat" shews that it was a place for hearing divine service, not a portion of the church that was conveyed.

If, however, the language of the act were large enough to apply to the land itself, I should still be of opinion that in this context without inflexible words it could not have the effect of vesting in

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a layman, other than the founder or rector, the freehold of the church; there is a whole series of authorities in which words, which in terms vested the freehold in persons appointed to perform some public duties, such as canal companies and boards of health, have been held satisfied by giving to such persons the control over the soil which was necessary to the carrying out the objects of the act without giving them the freehold. In *Stracey* v. *Nelson* (1) it was provided by an act that certain lands should be "vested in" the commissioners of sewers, and the Court held, notwithstanding, that only the control over the land, and not the freehold, passed to them. If I had to express in a formula the decision to which the revising barrister has rightly come, I should say that "a statutory right in a man and his heirs and assigns, being parishioners, to worship according to law in a defined part of a church, such right being worth 40*s.* a year, does not carry a vote at an election for knights of the shire."

BYLES, J. I am of the same opinion. I am satisfied, after hearing Mr. Mellish's argument, that the trustees have not the ownership of the soil, and though I admit that the trustees might, notwithstanding, have power to create an estate in the pews, if it was given them by the words of the act, I think it is clear that the right to the soil has not passed out of the rector, and I think that they have not created a tenement at all. I rather think an easement has been attached to a man and his family, acting as a license to sit in a certain place in the church, and that would not come within the definition of a tenement. On that point I have nothing to add to what has been said by my Lord and my Brother Willes. But, at any rate, it is clear that the claimant has not a descendible estate in the pew, and therefore, under 2 Wm. 4, c. 45, s. 18, as he does not occupy it himself, it must be of the value of 10*l.* in order to entitle him to a vote. By the express words of the statute, it goes not to the heirs of the purchaser, nor to the heirs of his body, but to his heirs being parishioners; and I think that such an interest much more nearly resembles a life estate than a fee simple, and that, therefore, the tenement, if it be one, is not of sufficient value.

(1) 12 M. & W. 535; 13 L. J. (Ex.) 97.

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KEATING, J. I am of the same opinion. At first sight, I was struck by the wide words of the act, but on looking through it I am clear that it was not the intention of the legislature to create a freehold interest in the pew so as to give a right to vote. I think that Mr. Williams failed to shew that the freehold was transferred from the rector to the trustees, and though, even if the freehold was not in them, the act might have given them power to create an estate in others, yet the sections do not shew that it was intended that they should have that power. The latter part of the 30th section is, I think, irreconcilable with the idea that the claimant has such an interest in the pew as would entitle him to vote, because it uses similar words with respect to persons who formerly possessed pews in the old church as are used in the 31st section with respect to persons like the claimant having pews granted to them by the trustees, and then expressly provides that they shall hold the pews in the new church in the same manner as they held their pews in the old church.

Decision affirmed.

Attorneys for appellant: *N., C., & C. Milne.*
Attorneys for respondent: *Lawrence, Markby, & Southey.*

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SC 12 Jur (N.S.) 963.

Evidence, of Witness in former Action—Privity of Estate—Mutuality.

In an action of ejectment A. the plaintiff proposed to cross-examine a short-hand writer as to the evidence given in a former action by a witness who had since died. The former action was ejectment by A.'s son, who claimed as A.'s heir-at-law, under the supposition that A. was dead, to recover the same premises from the defendant's father:—

Held, that there was no privity of estate between A. and his son, and that the evidence not being admissible against A., was not admissible for him.

EJECTMENT, tried before Shee, J., at the last summer assizes at Monmouth.

A previous action had been brought by the plaintiff's son against the defendant's father to recover possession of the same premises,

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and it being supposed at that time that the plaintiff was dead, his son had claimed the property as the plaintiff's heir-at-law.

At the trial, the defendant having called a short-hand writer to prove that one of the witnesses had added to the evidence he had given on the former trial, the plaintiff's counsel proposed to cross-examine him as to the evidence given at the former trial by another witness, Henry Morgan, who was since dead. The evidence was objected to on behalf of the defendant, and the judge upheld the objection.

A verdict having been found for the defendant,

Huddleston, Q.C. (*H. James* with him), moved for a new trial, on the ground that the judge was wrong in rejecting the evidence, and contended that the parties were in fact the same, the former plaintiff claiming only through the present plaintiff, and not independently of him, and that the admissibility of evidence taken at a former trial depended on whether the party against whom the evidence was offered had had the opportunity of cross-examining the witness at the time the evidence was taken, and not on whether the parties in the two actions were identically the same. He cited Taylor on Evidence, 410, 411; Buller's N. P. 239—243; and *Wright* v. *Tatham*. (1)

ERLE, C.J. I am of opinion that there should be no rule. This was an action of ejectment, and the plaintiff complains that certain evidence was wrongly rejected. The evidence rejected was the evidence of a short-hand writer as to what was said by a witness, Henry Morgan, on a former trial, in which the title to the same premises was in dispute. It must be taken that all the conditions exist which would make this evidence admissible if the present action had been between the same parties as the former action, or between persons claiming under them. Such evidence, however, is not admissible against the defendant, unless it would also be admissible against the plaintiff. Now the plaintiff in the former action was the son of the present plaintiff, and he brought the action supposing that his father, the present plaintiff, was dead, and the present plaintiff is for this purpose as distinct a person from his son as a perfect stranger; he does not in any way claim

(1) 1 Ad. & E. 3.

through him, and he cannot be injured by anything his son may have done at a former trial. The evidence, therefore, would not be admissible against the plaintiff, and it cannot therefore be admissible in his favour.

WILLES, J. I am of the same opinion. The contention of the plaintiff amounts to this, that the rule—that evidence given in a former trial upon the same matter and between the same parties, or persons privy to them, is admissible—extends to all cases in which the parties to the two trials are related in blood. The only relation between the plaintiffs in this and the former action is one of blood, a close one, it is true, but I apprehend the law must be the same as if the plaintiffs had been cousins deriving their title from the same person—a reductio ad absurdum. By persons privy to the former parties, is really meant persons claiming under them. Could it be said that this evidence would have been admissible if the former action had turned on whether the then plaintiff was the eldest son, or whether he was legitimate? It is contended that it is not necessary that the parties should be exactly the same, but here the two plaintiffs, for purposes of title, are entire strangers. The cases are collected in *Wright* v. *Tatham* (1), and that case shews that it is sufficient if the parties to the second cause were parties to the first, though there were other parties joined with them.

I agree also with the Lord Chief Justice, that the same rule applies as in cases of res judicata and estoppel, viz. that the evidence cannot be admissible against one party and not against the other; and it is clear that, if this evidence had been tendered by the defendant, the plaintiff would have said that he was not present at the former trial, and did not claim under the former plaintiff.

BYLES, J., concurred.

KEATING, J. I also think that this evidence was not admissible, because the parties to the two actions were not the same. The son, no doubt, had to claim through the father in the former action, but the father has not to claim through the son in this.

Rule refused.

Attorneys for plaintiff: *Rooks, Kenrick, & Crook.*

(1) 1 Ad. & E. 3.

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GRAY AND ANOTHER *v.* GIBSON.

Marine Insurance—Policy—Liability for Calls.

In a Lloyd's policy issued by a mutual marine insurance society, the amount of premium paid and the rate per cent. were left blank, but in place of the latter the words "twenty pounds per centum" were added in italics in a separate line. The policy also contained a provision incorporating in the policy the rules of the society. These rules contained nothing which limited the liability of the insurers, but provided that they should make good all losses according to the proportion of their premiums. The managers of the society had been appointed by a power of attorney containing no limitation, and signed by each of the members of the society. In an action by the managers for a call made on one of the members to reimburse themselves for money paid for a loss that had occurred during the time he was a member:—

Held, that whatever meaning, if any, the words "*twenty pounds per centum*" had, which the Court did not decide, they did not limit the amount for which each member was liable to 20 per cent. on the sum he had insured.

SPECIAL CASE stated for the opinion of the Court by an arbitrator, to whom the action had been referred by order of Montague Smith, J.

The plaintiffs were the managers of the Temperance and General Marine Insurance Association, appointed by the members of the association by a power of attorney, by which they were empowered, among other things, to sue for and recover all such sums of money as should become due and payable for premiums on every policy of insurance which should be by them or him underwritten in the name of the association, and to give acquittances and discharges for the same; and also to adjust and settle all such losses, averages, and contributions, as from time to time should or might happen, arise, or occur; and to draw upon the members of the association for, and, if they should think fit, pay and discharge for the members of the association respectively, and on their respective behalves, or account, their several proportions of or for such losses, averages, and contributions, when and as the same should become due.

The policies used by the association were in the ordinary form of a Lloyd's policy, but the amount of premiums paid, and the rates per cent., were not filled in, but the words "twenty pounds per centum" were added in italics in a separate line. The policies concluded: "It is mutually agreed that the annexed regulations

shall form a part of this policy. 500*l.* A. and J. Gray. Five hundred pounds. Per procuration of the several members of the Temperance and General Marine Insurance Association, every member bearing his equal proportion, according to the sums mutually insured therein."

The annexed regulations included the following:

1st. That the members of this association shall severally and respectively, not jointly or in partnership, nor the one for the other of them, but each only in his own name, insure each other's ships, or shares of ships, from noon of the 28th day of February, 1863, or from the date of entry of each vessel respectively, until noon of the 28th day of February then next, and from that time, until noon in the 28th day of February in the next succeeding year, and so on from year to year, unless notice to the contrary be given, as hereinafter mentioned, against all losses, perils, and damages of whatever nature or kind soever which may be sustained or received by their respective ships, or caused or done by them to other ships or craft, except when on the voyages, in the trades, or under the circumstances hereinafter particularly excepted: Provided, nevertheless, that if any member fail to pay his proportion of any loss or losses in consequence of bankruptcy or insolvency, the deficiency of payment shall fall on, and be borne by, the whole solvent members proportionately, according to the sum insured.

3rd. That the ships to be admitted and insured by this association shall be such only as are approved by the committee of management. That the committee shall have full power, and are hereby authorized to classify and enrol the various vessels as admitted by them for insurance into first, second, and third class risks, the owners of such vessels being charged respectively at the rate of 5 per cent. for first-class risks, 7½ per cent. for second-class risks, and 10 per cent. for third-class risks. That the sums to be insured in this association shall be from 200*l.* to 1000*l.* on each ship, with power to increase it to 1500*l.*

6th. The premiums of insurance charged against each member shall form the fund for paying all losses sustained by the association, that is to say, each member shall bear his share of such losses and expenses in proportion to the amount of premiums charged: Provided, nevertheless, that if the gross amount of losses

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and expenses for the year shall exceed the amount of premiums realized, the deficiency shall be made good by an additional percentage upon the premiums, which the members shall be bound respectively to contribute and pay to the managers. But if the premiums realized shall exceed the losses and expenses incurred, then, and in that case, the surplus shall be divided among the members rateably, according to the amount of premiums contributed by them respectively.

8th. That in order to provide for the payment of losses as they may happen in the course of the year, the managers shall be entitled, and are hereby empowered, to levy quarterly collections of one-fourth part of the fixed annual premium, payable in advance, by draft, at sixty days respectively, from the 20th day of February, May, August, and November.

20th. That in case of loss the owner shall be liable for the amount of estimated annual premium only; he shall not be liable for extra calls, nor entitled to any return of premium.

The defendant insured his ship *Helen* on February 20th, 1863, in the association, in the sum of 500*l*. The ship belonged to the class A E, and the annual premium amounted to 45*l*., being calculated at the rate of 9 per cent. During the year 1863-4 the whole annual premium was paid in four equal quarterly instalments, all subsequently to the issuing of the policy. During the year 1864-5 three calls were made and paid, amounting in the whole to 60*l*. On the 9th of February, 1865, a fourth call was made of two-fifth parts of the annual premium, or 18*l*., which the defendant refused to pay, and it was to recover this that the present action was brought.

The losses in respect of which all the above calls were made occurred during the year of insurance, 1863-4, and the amount had been paid by the plaintiffs to the assured who had sustained them.

The questions for the opinion of the Court were:

1st. Whether the plaintiffs were conclusively bound by the acknowledgment of the receipt of 20 per cent. as appearing on the face of the policy?

2nd. Whether on the true construction of the policy and rules of association of the Temperance and General Marine Association, and the power of attorney relating thereto, the plaintiffs were

entitled to recover the amount of the call made February the 9th, 1865?

3rd. Whether the plaintiffs were entitled to recover the amount referred to in the last question as money paid?

Cohen, for the plaintiffs. The real question is, whether the defendant's liability as a member of the association is limited by the words in the policy "twenty pounds per centum" to 20 per cent. on the sum for which his ship was insured. The rules of the association contain no such restriction; and if there be a discrepancy between the rules and the policy, the former should prevail, because they have been specially prepared for the association, while the policy is an ordinary Lloyd's policy and not altogether adapted to the purpose for which it is used: see Duer on Insurance, p. 166. According to the 1st rule, the members insure one another's ships against all losses and perils, and no limitation is mentioned; and in case of bankruptcy the sum due from the bankrupt is to be borne rateably by the solvent members; a provision which might involve the payment of more than 20 per cent. on the sum insured by them. The 6th rule specially provides that the members shall be bound to make good, in proportion to the amount of their premium, any deficiency in the fund formed by the premiums for the payment of losses. The words in the policy must be interpreted consistently with these rules. In the 21st rule it is provided that in case of total loss the owner shall be liable for the amount of the *estimated* annual premium. This is not the premium made payable by rule 3, which is called "the fixed annual premium;" it may be that it is this which is settled by the policy at 20 per cent., policies being usually framed with special reference to a total loss; and the only effect of the words in that case would be that, in case of total loss, the person insured would only be entitled to receive 80 per cent. of the sum insured.

The more probable explanation of the words, however, is that they were put in to comply with 35 Geo. 3, c. 63, s. 11, which requires that the rate of insurance should be stated in a policy, and that they have no distinct meaning. The premiums in such policies are stated in Marshall on Insurance, p. 35, to be only nominal. Any limitation, such as is contended for by the defendant, would be unreasonable, because, as the losses are to be

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paid as soon as they are known, the first losses would be paid in full, and the owners of ships lost late in the year might receive nothing. Moreover, it would give an advantage to inferior ships, as they would have to pay only 11 per cent. in addition to the premium, instead of 15 per cent. Whatever is the interpretation of the policy and the rules, the plaintiffs have a right to recover from their principals this money, which it is admitted they have paid, the power of attorney under which they acted having been unlimited; and the plaintiffs must recover it back from the persons to whom it was paid, if it was not really due to them.

Lewers, for the defendant. A meaning must be given if possible to the words "twenty pounds per centum." They are the only consideration for the insurance, and to expunge them is to do violence to the whole policy. A reasonable interpretation is, that they fix the amount which the defendant promises to pay, if necessary, and the limit therefore of his liability. If there were no limit fixed, the defendant might have to pay more than the whole value of his ship, and no one therefore would insure. Any sum paid by the managers beyond what would amount to 20 per cent. on the sums insured, was therefore a payment ultra vires, and they cannot recover it from the members. This interpretation gives no advantage to inferior ships, it only puts all ships on an equality in the extreme case of the calls on all ships amounting to the full amount payable in respect of them. The case of bankruptcy may perhaps be exceptional, and the solvent members liable, under the express terms of the 1st rule, to pay beyond the sum named in the policy.

Cohen, in reply.

ERLE, C.J. I am of opinion that our judgment should be for the plaintiffs. The action is brought by the managers of a marine mutual insurance society, who have settled, as they were authorized to do, certain claims against the society, and they sue one of the members of the society for his share of the advances so made. The sum claimed, together with what the defendant has already paid, will amount to more than 20 per cent. upon the sum for which the defendant is insured in the society; and the question is, whether his liability is limited to that amount? On looking at the whole of the policy, I find that the members mutually insure one another to the

full extent, and there is nothing in the rules of the society to shew that their liability is limited; on the contrary, Mr. Cohen has shewn very clearly that the party who framed them intended that the assured should recover in case of loss at least 80 per cent. of the sum insured. The only thing which the defendant contends is inconsistent with this, are the words at the bottom of the policy, "twenty pounds per centum." These words stand by themselves, unconnected with anything else; and Mr. Lewers contends that they mean that the insurers limit their liability to that amount. I do not see how such a meaning can be obtained from the words themselves, and there is nothing in the rules of the policy to lead us to give such a meaning to the words, unless it is their necessary signification. This being so, it appears there is an act (35 Geo. 3, c. 63, s. 11) which requires that every policy of insurance shall state the rate of insurance; and it would seem from Marshall on Insurance that the naming of any sum is a sufficient compliance with the statute, even though it has no other meaning. This, therefore, seems to afford a reasonable explanation of the words.

The power of attorney given to the managers is entirely consistent with this view, and inconsistent with that contended for by the defendant.

WILLES, J. I am of the same opinion. The liability of the members of a mutual insurance society depends usually on the rules of the society and not on the policy, though it has been considered as questionable since *Bromley* v. *Williams* (1) whether the issuing of a policy is not necessary for the purpose of giving a right of action against the members. I concur in thinking that the insertion of the words "twenty pounds per centum" may be accounted for by the desire to escape the question whether a policy of insurance issued by such a society comes within the scope of 35 Geo. 3, c. 63, s. 11. To avoid that question it was necessary either to put in some nominal premium, or to state what the premium really was. If the society had used a policy of their own, they would have probably done the latter, but as they used a Lloyd's policy, which was not in all respects suited to their purposes, they put in a nominal premium, which happens to be 20 per cent.

(1) 32 Beav. 177; 32 L. J. (Ch.) 716; 9 Jur. N.S. 240

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If this be not the explanation, and if some effect must be given to the words, there are two ways of doing so—one by holding that it is the real amount of premium to be allowed by way of deduction by the member in case his vessel is lost, and the other that it is the limit of the amount of contribution to which the member may be liable. I think the former interpretation the better, for when the underwriter fixes a limit to his liability, he does so at the end of the policy; while here, after the words "twenty pounds per cent.," we have the words "every member bearing his equal proportion according to the sums mutually insured therein," which seem inconsistent with any previous limitation of the underwriter's liability. The former meaning is one of which the words will admit, and amounts to saying that the sum the insured shall receive in case of loss shall be limited to 80 per cent. on the sum named in the policy.

Whether, therefore, the words are to receive any interpretation or not, the plaintiff is entitled to our judgment, unless there is something else in the instrument to support the defendant's views. So far from this, however, Mr. Lewers had to admit that the first rule mentioned one case in which the insured might be liable to pay more than 20 per cent. on the sum insured by him, and by the sixth rule the members are bound respectively to make good any deficiency in the fund for the payment of losses by paying an additional percentage on their premiums. Therefore I not only do not find the limitation contended for by the defendant in the policy, but I find no mention of it in the rules which are the foundation of the whole transaction. I do not think that the absence of such limitation really involves the insurers in any undue risk, both because the risk is limited in any case to the defendant's proportion of the whole sum insured, and that by the rules cannot exceed a certain amount, and still more, because of the extreme improbability that any large number of the ships should be lost together. In the case of *Bromley* v. *Williams* (1) there appears to have been a liability as great as in the present case.

BYLES, J. I should have thought that the assured, in case of loss, was entitled to recover the whole amount insured, with this

(1) 32 Beav. 177; 32 L. J. (Ch.) 716.

limitation, that the amount which each of the members was liable to contribute should not on the whole exceed 20 per cent. on his insurance. But I do not feel sufficiently clear upon the point to express a different opinion from the rest of the Court.

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KEATING, J. I entirely concur in the reasons given by my Brother Willes. It is impossible that the rules which were agreed to specially by the parties themselves should have no reference to such a limitation as that contended for by the defendant, if it existed. If I thought the words were put into the policy for any other reason than to get rid of the effect of the statute 35 Geo. 3, c. 63, s. 11, I should be inclined to give them the meaning suggested by Mr. Cohen.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Elmslie, Forsyth, & Sedgwick.*
Attorney for defendant: *Richard Walthew.*

YOUNG AND ANOTHER *v.* MATTHEWS.

Nov. 3.

Vendor and Purchaser—Bargain and Sale—Property in Goods.

It depends on the intention of the parties whether the property in goods, to which something remains to be done before they are ready to be delivered, passes to a buyer at the time of the sale or on the completion of the goods.

A., a brickmaker, who was in embarrassed circumstances, sold to B., to whom he was largely indebted, a large quantity of bricks. B. sent an agent to the brickfield with an order for the delivery of the bricks, and A.'s foreman told him he was ready to commence delivering them if a man, who was in possession under a distress put in by the landlord, was paid out, and he pointed out three clamps, one consisting of finished bricks, a second of bricks still burning, and a third of bricks moulded but not burnt, as those from which he should make the delivery. A. having become bankrupt, the landlord sold some of the bricks, and B. sold the remainder to C., who removed them. In an action of trover by the assignees of A. against C. for the bricks:—

Held, that the conduct of A.'s foreman was a sufficient appropriation of the bricks, and that the property in the whole of them, though unfinished, passed to B. at the time, such having been apparently the intention of the parties.

TROVER for bricks.

Pleas, not guilty, and not possessed.

This case was tried before Erle, C.J., at the sittings for London, after last Trinity Term, when the following facts were proved:—

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The plaintiffs were the assignees of Moxon, a bankrupt. Moxon was a builder and brickmaker, and in the early part of 1865 had drawn several bills of exchange on one Northen, who had accepted them for his accommodation. When the bills became due Moxon was unable to pay them, and agreed to sell Northen 1,300,000 bricks, and an invoice of them was made out to him.

Northen sent an agent to the brickfield with an order from Moxon for the delivery of the bricks, and Moxon's foreman then stated that the ecclesiastical commissioners, who were the owners of the field, had put in a distress for rent, but that if the man in possession were paid out, he should be ready to deliver the bricks, and he pointed out three clamps from which he should make the delivery, of which one consisted of finished bricks, a second was still burning, and the third consisted of bricks which had been moulded but not burnt. Northen's agent then said, "Do I clearly understand that you are prepared, and will hold and deliver this said quantity of bricks?" and Moxon's foreman said, "Yes." Subsequently, on November 24, 1865, Moxon became bankrupt, and the ecclesiastical commissioners then sold, under the distress, sufficient bricks to cover the rent, and Northen afterwards sold the remainder to the defendant, who removed them from the field.

A verdict was found for the defendant, and leave was reserved to the plaintiffs to move to enter the verdict for them, on the ground that there was no such appropriation of the goods as to pass the property in them under the contract of sale.

Brown, Q.C., moved for a rule, pursuant to the leave reserved, and contended that the property in the bricks could not have passed to Northen at the time of the sale, nor at the interview with Moxon's foreman, something more remaining to be done before the bricks would be ready for delivery. He cited *Rugg* v. *Minett*. (1)

[WILLES, J., referred to *Acraman* v. *Morrice*. (2)]

ERLE, C.J. I am of opinion that there should be no rule in this case. The question is, whether the property in the bricks passed

(1) 11 East, 210. (2) 8 C. B. 449; 19 L. J. (C.P.) 57.

to Northen or not, and in determining this we are to look at the intention of the parties. It is very material that Northen had made large advances to Moxon, and when the latter became embarrassed he might well wish to have all he could appropriated to him. The well-known general rule, that the property does not pass to the buyer while anything remains to be done by the seller, either to complete the goods or to ascertain the price, does not therefore apply to the present case. There is no doubt that the parties could pass the property in all the bricks, whether finished or not, if such was their intention; and what passed amounted to this: Northen's agent said, "Are all these appropriated to my principal?" and the seller's agent said, "Yes." Even if this were not so, it might be contended, on the authority of *Langton* v. *Waring* (1), that the defendant had an equitable right to the goods as a security for the price he had paid for them; and that the assignees, who must have an equitable as well as legal title, cannot therefore recover. Under the circumstances, however, it is unnecessary to decide this.

WILLES, J. I am of the same opinion.

BYLES, J. This is not like a sale of unascertained goods; the goods were ascertained and pointed out, though not finished; and it appears to have been the intention of the parties that the property in them should pass to Northen.

KEATING, J., concurred.

Rule refused.

Attorneys for plaintiffs: *Ashurst & Co.*

(1) 18 C. B. (N. S.) 315.

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[IN THE EXCHEQUER CHAMBER.]

THE EARL OF SHREWSBURY AND ANOTHER *v.* KEIGHTLEY AND OTHERS.

Construction—Private Estate Act—Power of Leasing—Mode of Enjoyment.

By a private act of 6 Geo. 1, c. xxix., passed in 1720 for the purpose of confirming a prior settlement, the Shrewsbury estates were limited to the issue of the settlor as they should succeed to the earldom; and the act contained powers for each successive tenant for life or in tail to lease all or any part of the lands for three lives or twenty-one years, or for any term of years determinable on three lives, so as there should be reserved and made payable by every such lease the usual and accustomed yearly rents, boons, and services, with a proviso for re-entry for non-payment.

By a subsequent act, passed in 1803, certain outlying portions of the estate were conveyed to trustees, "for ever freed, released, and discharged, and absolutely acquitted, exempted, and exonerated, of and from all and every the uses, trusts, estates, entails, remainders, charges, *powers*, provisoes, limitations, and agreements in and by the settlement and the act of 1720 respectively created, limited, provided, and declared of and concerning the same hereditaments and premises, or any of them, except only such leases as had been theretofore made and granted of the same in pursuance of the powers contained in the said settlement and act," in trust to sell, and, on payment of the purchase money, to convey the same to the purchasers "freed and discharged, and acquitted, exempted, and exonerated as aforesaid,"—the proceeds of such sales to be laid out in the purchase of other lands, to be subject to the same uses, &c., as the lands so sold.

By the 7th section of the act of 1803 it was enacted and declared, that, "in the meantime and until the said manors, lands, &c., thereby directed to be sold, should be sold in pursuance of the trusts aforesaid, the same premises respectively should be held, possessed, and enjoyed, and the rents, issues, and profits thereof should be had, received, and taken by and be applied to and for the benefit of such person and persons as would have been entitled thereto, and ought to have held, possessed, or enjoyed and received the same respectively in case that act had not been made."

No sale was effected under the powers conferred by this act: and in 1838 the then earl granted to one Pim a lease of a portion of the land so vested in the trustees for sale, for ninety-nine years, provided three persons named, or either of them, should so long live, at the yearly rent of 30*l.*, Pim covenanting to lay out 1000*l.* in building on the land within five years:—

Held by the Exchequer Chamber,—affirming the judgment of the Court of Common Pleas,—that the earl had no power to lease the land in question so as to bind succeeding tenants in tail of the Shrewsbury estates.

EJECTMENT for lands in the township of Oxton, in the parish of Woodchurch, in the county of Chester.

The cause came on for trial before Williams, J., at the Chester

spring assizes, 1864, when a verdict was found for the plaintiffs, subject to the following case:—

1. Charles, Earl and Duke of Shrewsbury, being seised in his demesne as of fee of the whole of the township of Oxton, in the county of Chester, by indentures of lease and release dated the 30th and 31st of October, 1700, settled the said township with other lands, after his own death and failure of his issue, and after other uses not necessary to be here mentioned, and since determined, to the use of George Talbot for life, remainder to the first and other sons of the said George Talbot successively in tail male; remainder to John Talbot for life, remainder to his first and other sons successively in tail male; remainder to Sir John Talbot for life, remainder to his first and other sons successively in tail male; with reversion to the said Charles, Earl and Duke of Shrewsbury, in fee; and the settlement contained powers of jointuring and leasing.

2. On the 1st of February, 1717, the duke died, having by his will, dated the 19th of July, 1712, devised other estates to the uses of the settlement of 1700, and leaving his cousin Gilbert, Earl of Shrewsbury, his heir-at-law.

3. By indentures of lease and release dated the 3rd and 4th of March, 1718 (being the settlement on the marriage of George Talbot and Mary Fitzwilliam), Gilbert, Earl of Shrewsbury, and certain other persons, according to their respective interests, conveyed (inter alia) the said township, after the determination of certain estates therein (which have long since determined), to the use of George Talbot for life, remainder (subject to a jointure rentcharge) to the use of the first and other the sons of George Talbot by the said Mary Fitzwilliam, in tail male successively, remainder to his first and other sons by any after-taken wife successively in tail male; remainder to John Talbot for life, remainder to his first and other sons successively in tail male; and the settlement contained powers of jointuring and of leasing.

4. By the Shrewsbury Estate Act, 1720, 6 Geo. 1, c. xxix., the said marriage settlement, and all the uses therein limited, were ratified and confirmed.

5. By s. 2 of that act it was enacted that, after the decease of George Talbot and John Talbot, and failure of issue male of

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their respective bodies (which events have happened), certain lands formerly of the said duke, including the said township, should be and remain to the use of Gilbert, Earl of Shrewsbury, for life, remainder to his first and other sons in tail male; remainder to the use of all and every person and persons, being issue male of the body of John, the first Earl of Shrewsbury, to whom the title, honour, and dignity of Earl of Shrewsbury should, after the decease of Gilbert, Earl of Shrewsbury, George Talbot, and John Talbot, without issue male of their respective bodies, by virtue of the letters-patent of creation of the said earldom, descend and come, severally and successively one after another, as they and every of them should succeed to and inherit the said earldom, and of the several and respective heirs male of the body and bodies of all and every such persons issuing, to attend and wait upon the said earldom, and to be annexed to and descend with the same: and the act contained powers to charge portions and other sums, and to jointure, and a restriction on alienation of the estates.

6. By s. 10 of the act it was enacted that it should be lawful to and for all and every person and persons to whom the said hereditaments and premises were limited by the said act successively as aforesaid, by any deed or writing by them respectively to be signed in the presence of two witnesses, to demise or lease all or any parts of the said hereditaments and premises whereof the person making such lease should be actually possessed, to any person or persons, in possession, and not in reversion, for the term of three lives or twenty-one years, or for any term or number of years determinable upon the death or determination of three lives, so as upon all and every such lease and leases there should be reserved and made payable yearly during the continuance thereof the usual and accustomed rents, boons, and services for the same, with power of re-entry for non-payment thereof, and with the usual provision as to a counterpart of such leases.

7. At the time of the passing of the next stated act, George Talbot, and Gilbert, Earl of Shrewsbury, were dead; and the title of Earl of Shrewsbury and the aforesaid hereditaments and premises had descended to Charles, fifteenth Earl of Shrewsbury, who was grandson and heir male of the body of the said George Talbot by the said Mary, his wife.

8. By an act passed in 1803 (43 Geo. 3, c. xl.), intituled "An act for vesting part of the settled estates of the Right Honourable Charles, Earl of Shrewsbury, in the counties of Salop, Chester, Berks, Wilts, and Oxford, in trustees to be sold, and for laying out the moneys to arise by such sale in the purchase of other lands to be settled in lieu thereof to the same uses and subject to the same restrictions,"—after recitals shewing the purposes of the act, it was enacted that certain hereditaments including the township of Oxton limited and settled by the indentures of the 3rd and 4th of March, 1718, and the Shrewsbury Estate Act, 1720, and mentioned in the now stating act should, from and after the passing of the Shrewsbury Estate Act, 1803, be, and the same were thereby vested in and settled upon Thomas Wright and Charles Conolly, Esqs., their heirs and assigns for ever, freed, released, and discharged, and absolutely acquitted, exempted, and exonerated of and from all and every the uses, trusts, estates, entails, remainders, charges, powers, provisoes, limitations, and agreements in and by the said indentures of settlement of the 30th and 31st of October, 1700, the said will of the said Charles, Duke of Shrewsbury, the said indentures of the 3rd and 4th of March, 1718, and the said Shrewsbury Estate Act, 1720, respectively created, limited, provided, and declared of and concerning the same hereditaments and premises, or any of them, except only such leases as had been theretofore made or granted of the same respectively in pursuance of the powers contained in the said settlement and act of parliament; upon trust that they, the said Thomas Wright and Charles Conolly, should with all convenient speed, with the consent and approbation of the said Charles, then Earl of Shrewsbury, to be testified by some writing under his hand, and, after his decease, then with the consent of the person or persons who should then be in possession of the said estates respectively by virtue of the limitations before mentioned, sell and dispose of the said hereditaments and premises so by the said act of 1803 vested in them as aforesaid, either together or in parcels, by public sale or private contract, unto any person or persons who should be willing to become the purchaser or purchasers thereof, for the best price that could be reasonably gotten for the same, and, upon payment of the purchase moneys for which the said hereditaments and premises should be sold, should convey

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and assure the same respectively unto and to the use of the purchasers, their heirs and assigns respectively, or as they should direct or appoint, freed and discharged, and acquitted, exempted, and exonerated as aforesaid. The act also provided for the reinvestment of the proceeds of such sales in the purchase of other estates, to be settled to the same uses, and subject to the same powers as the lands which had been sold.

9. By the 7th section of the Shrewsbury Estate Act, 1803, it was enacted that in the meantime, and until the said hereditaments and premises by the act directed to be sold should be sold in pursuance of the trusts aforesaid, the same premises respectively should be held, possessed, and enjoyed, and the rents, issues, and profits thereof should be had, received, and taken by and be applied to and for the benefit of such person as would have been entitled thereto, and ought to have possessed or enjoyed and received the same respectively, in case the last-mentioned act had not been made.

10. The 8th section of the act conferred powers of appointing new trustees.

11. Lord Dynevor (one of the plaintiffs) was duly appointed, and is now the sole surviving trustee of the act; and the lands for the recovery of which this action is brought are now vested in him as such trustee, but subject to the lease (of the 2nd of February, 1838) hereinafter mentioned, in case the same is valid and subsisting.

12. These lands have not, nor has any part thereof, ever been sold under the provisions of the said act.

13. By indenture of lease made the 2nd of November, 1830 (which for the purposes of the case is admitted to have been executed and perfected in conformity with the powers contained in the act of 1720, save in so far as herein appears to the contrary), John, Earl of Shrewsbury, being then heir male of the body of the second son of George Talbot (whose first son had died without leaving any issue male), son of Gilbert Talbot in the Shrewsbury Estate Act, 1720, mentioned, demised eighty acres in the township of Oxton (part of which are the lands sought to be recovered in this action) to Samuel Ackerley, for ninety-nine years from the 2nd of November, 1830.

14. By indenture of lease of the 2nd of February, 1838 (executed

and perfected in like manner), the said John, Earl of Shrewsbury, in consideration of the surrender of the lease of the 2nd of November, 1830, demised seventy-eight acres in the township of Oxton (which are the lands sought to be recovered in this action) to Joseph Robinson Pim for ninety-nine years, if three persons named in the said lease, or either of them, should so long live, at the yearly rent of 30*l.*; Pim covenanting to lay out 1000*l.* in building on the said land within five years.

15. One of the three persons named in the last-mentioned lease, upon whose deaths the same is determinable, is still living.

16. On the 9th of November, 1852, John, Earl of Shrewsbury, died without leaving any male issue, and thereupon Bertram Arthur, the seventeenth and last Earl of Shrewsbury, succeeded to the title and estates annexed to it. He died a bachelor on the 10th of August, 1856, and thereupon the issue male of George Talbot, on whom the estates were by the settlement of the Duke of Shrewsbury and by the act of 1720 settled in tail male, became extinct; and thereupon (upon failure and in default of issue male of Gilbert, Earl of Shrewsbury, of George Talbot, and of John Talbot, in the Shrewsbury Estate Act, 1720, named) the present Earl of Shrewsbury became and now is the person, being issue male of the body of John, first Earl of Shrewsbury, to whom the title, honour, and dignity of Earl of Shrewsbury did, after the decease as aforesaid of the said Gilbert, Earl of Shrewsbury, George Talbot, and John Talbot, without issue male of their respective bodies, by virtue of the said letters-patent of creation of the said earldom, descend and come.

The question for the opinion of the Court was, whether John, Earl of Shrewsbury, had power to demise by the indenture of lease of the 2nd of February, 1838, the lands by the Shrewsbury Estate Act, 1803, vested in the trustees for sale, so as to bind the plaintiffs.

The Court below held that the earl had no power to lease the land in question so as to bind succeeding tenants in tail of the Shrewsbury estates: see 19 C. B. (N.S.) 606; 34 L. J. (C.P.) 322. The defendants thereupon brought a writ of error; and the case was argued in the Exchequer Chamber at the sittings after Trinity Term last.

(1) S. C. 11 Jur. N.S. 1002.

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June 15, 16. *Sir Hugh Cairns* (*Mellish, Q.C.*, and *Kay*, with him), for the plaintiffs in error. If the lease in question had been made between the years 1720, when the 6 Geo. 1, c. xxix., was passed, and 1803, the date of the 43 Geo. 3, c. xl., it would have been a perfectly good lease. By the 10th section of the former act power was given to the successive tenants in tail of the settled property to grant leases "in possession, and not in reversion, for the term of three lives or one and twenty years, or for any term or number of years determinable upon the death or determination of three lives, so as upon all and every such lease and leases there be reserved and made payable yearly during the continuance thereof the usual and accustomed yearly rents, boons, and services for the same, and so as in every such lease there be contained a condition of re-entry for non-payment of the said rent." In 1803 it was considered advisable to sell certain outlying portions of the property. These were described in a schedule annexed to the act of 43 Geo. 3, c. xl., and the legal estate in them was vested in certain trustees, who were authorized with the consent of the earl for the time being to sell, and with the proceeds to purchase other lands to be settled to the same uses. In order to carry out this intention, it was necessary that the scheduled lands should vest in the trustees free of the uses, trusts, and powers contained in the act of 1720; and it was necessary to make provision for what should be done until the contemplated sales took place; and accordingly the 7th section of the act of 1803 enacts that, "in the meantime, and until the said manors, lands, &c., hereby directed to be sold, shall be sold in pursuance of the trusts aforesaid, the same premises respectively shall be held, possessed, and enjoyed, and the rents, issues, and profits thereof shall be had, received, and taken by and be applied to and for the benefit of such person and persons as would have been entitled thereto, and ought to have held, possessed, or enjoyed and received the same respectively in case this act had not been made." The validity of this lease depends mainly upon the construction to be put upon that clause. The judgment of the Court below seems to admit that, if the tenant in tail had a power of leasing before the passing of the act of 1803, he has it still: but the Court say that the power of leasing contained in the act of 1720 was at "the usual and accustomed yearly rents," which

would carry with it the right to take a fine, and so place the tenant in tail in a better position than the remainder-man; and they come to the conclusion that the legislature could not have intended by the 7th section of the act of 1803 to re-create the power of leasing contained in the 10th section of the act of 1720, because that would have the effect of defeating the power of sale, which was the main object of the 43 Geo. 3, c. xl. The principle of that decision is fallacious. The mode of enjoyment as to this estate is to be taken from the words of the act of 1720, which, amongst other things, makes the tenant in tail unimpeachable of waste. No precise form of words is necessary to create a power; any words which indicate an intention to give or reserve it, are sufficient for the purpose: Sugden on Powers, 8th ed. 102. The power of leasing is incident to the enjoyment of the estate; and the perception of a fine is a part of the annual profits: per Lord Mansfield in *Taylor* v. *Horde* (1), and per Shadwell, V.C., in *Skeeles* v. *Shearly*. (2) The general scope of the act of 1803, as shewn by the recitals, was that nothing should be altered until a sale took place.

[BLACKBURN, J. By the 1st section the lands mentioned in the schedule are vested in the trustees, "for ever freed, released, and discharged, and absolutely acquitted, exempted, and exonerated of and from all and every the uses, trusts, estates, entails, remainders, charges, powers, provisoes, limitations, and agreements," in and by the settlement and the act of 1720 respectively limited, "except only such leases as have been heretofore made or granted of the same respectively, in pursuance of the powers contained in the said settlement and act of parliament." And the trustees are to convey the lands to purchasers, "freed and discharged, and acquitted, exempted, and exonerated as aforesaid." The 7th section points rather to the mode of enjoyment until sale.]

The effect of the 7th section is, to re-limit the lands. They are to be possessed and enjoyed by the tenant in tail, with all the former incidents of such possession and enjoyment.

Manisty, Q.C. (*Hannen,* with him), contrà. The Court is asked to imply a power against the express language and the manifest intention of the act of parliament. The object of the act of 1803

(1) 1 Burr. 60, 121. (2) 8 Simon, 153, 158.

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is abundantly evidenced by the recitals. The Earl of Shrewsbury was then possessed of considerable estates, in several counties, and much scattered. Under the settlement and the act of 1720, he was without power to bar the entail; but he possessed certain powers of leasing, of jointuring, and of charging the estate with portions for younger children. It was thought desirable that certain of the outlying portions of the estate should be sold, and it was evidently contemplated that they would be sold forthwith; and the first object of the act of 1803 was to take these out of settlement, and to vest them in trustees for sale, freed from all the trusts and powers to which they were then subject, "except only such leases as had been theretofore made or granted of the same respectively in pursuance of the powers contained in the settlement and act of parliament." This object is effected by the plain language of s. 1. The only effect of the 7th section is, that, until sale, the rents and profits of these lands are to be enjoyed by the tenant in tail as before.

[POLLOCK, C.B. The earl was not to lose the income he enjoyed before. If it was essential to that enjoyment that he should have a power of leasing, will he not still have it?]

To enable the trustees to sell in pursuance of the act of 1803, it was essential that the old leasing power should be at an end; and there are no words in the act to revive it.

[MELLOR, J. The effect of the 7th section, upon your construction, is, that the same person is to enjoy the rents and profits, but not in the same manner.]

Any other construction would totally defeat the declared intention of the act.

Sir Hugh Cairns, in reply. It is impossible that property like this can be enjoyed otherwise than by means of a power of leasing. It is suggested that the act of 1803 contemplated an *immediate* sale of the scheduled lands. That, however, could hardly be. It would be necessary first to have the consent of the earl for the time being, the consent of the trustees, an eligible offer for the land to be sold, and an opportunity of acquiring other lands which might conveniently be consolidated with the settled estates. The act contemplates successive sales, and that much time would be required to carry its intentions into effect. In the report of *Skeeles*

v. *Shearly* in 6 L. J. (Ch.) 21, 23, Shadwell, V.C., is represented to have said: "With regard to leases made under powers, it is to be observed that it is quite impossible to have the enjoyment of an estate in settlement, except through the medium of powers of leasing; and it has never yet been held, where there has been a settlement to mere uses, with power for tenant for life to make leases, and with power to trustees to revoke the old uses, and appoint new ones by way of sale, that the exercise of that power by the trustees would defeat the leases made by the tenant for life under his power. I apprehend the courts of law will never adopt that construction, on account of the great insecurity of those who contract as tenants with those who are tenants for life." In what manner is the earl to enjoy under s. 7? As tenant at will, or as tenant in tail? Clearly not at the will of the trustees. He cannot be disturbed until he consents to it. Can he commit waste,—work mines, or cut timber? Is he an equitable freeholder? Is he tenant in tail without power of alienation, except the limited one given to him? The granting of leases, taking fines, is clearly no greater disturbance of the existing state of things than the preamble contemplates. Reading the 7th section as incorporated in the 1st section, the effect is that the dry legal estate is vested in the trustees, freed from all the trusts, powers, and limitations created by any of the four instruments mentioned, with the exception only of leases theretofore granted; and the earl is to possess and enjoy the rent and profits as he would have done if the act had not been passed; with a power of leasing, as incident to that enjoyment, not under the old, but under the new act.

[BLACKBURN, J. This is new to me. I have all along understood that the power of leasing was assumed under the act of 1720.]

No formal words are needed to create a power. The power of leasing is assumed to be re-created by s. 7 of the act of 1803, read as incorporated in s. 1. This puts an end to the technical argument founded upon the words at the end of that section.

Cur. adv. vult.

November 29. The judgment of the Court (Pollock, C.B.,

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Channell, B., Blackburn, J., Mellor, J., and Pigott, B.), was delivered by

CHANNELL, B. This was error upon a judgment of the Court of Common Pleas in favour of the plaintiffs on a special case.

The question is one of considerable nicety, but lies in a small compass, depending entirely on the construction of two sections of one of the Shrewsbury Estate Acts, 43 Geo. 3, c. xl., ss. 1 and 7.

By the 6 Geo. 1, c. xxix., confirming the settlement of the Shrewsbury estates, those estates were rendered inalienable; but by s. 10 a power was given to the tenant in tail in possession to grant leases, in possession and not in reversion, for three lives, or for any term of years determinable upon the death of three lives, reserving the usual and accustomed rents. Under this section, the tenant in tail in possession might accept a surrender of the current lease, and renew it, taking a fine, which would be paid whenever the accustomed rent was smaller than the rack-rent, as would generally be the case; and no doubt fines thus taken would be a portion of the profits of the estate enjoyed by the tenant in tail in possession.

By the 43 Geo. 3, c. xl., after reciting the previous settlement and the act confirming it, and that certain outlying estates specified in a schedule to that act might with advantage be sold and the purchase-money re-invested, it is enacted that the lands mentioned in the schedule should from the time of the passing of the act be vested in certain named trustees, their heirs and assigns, for ever, "freed, released, and discharged, and absolutely acquitted, exempted, and exonerated of and from all and every the uses, trusts, estates, entails, remainders, charges, powers, provisoes, limitations, and agreements" in the settlement and the act confirming it contained, "except only such leases as have been heretofore made or granted of the same respectively, in pursuance of the powers contained in the said settlement and act of parliament,"—upon trust "with all convenient speed," with consent of the tenant in tail in possession, if of full age, or, if he should be an infant, of their own authority, that they should sell the same, and, on payment of the price into the bank, "shall and do convey and assure the same respectively unto and to the use of the pur-

chaser or purchasers thereof, and his or her or their heirs and assigns respectively, or as he or they shall direct or appoint, freed and discharged, and acquitted, exempted, and exonerated *as aforesaid.*"

The intention of the legislature here appears pretty clearly to be that the trustees should convey to the purchasers the absolute fee-simple of the lands sold, free from every incumbrance except only such leases as had at the time of the passing of the act been already granted under the power. The trusts are, to sell the lands *with all convenient speed;* but, as this could not be done at once, it is enacted by s. 7 that, until the said lands &c. shall be sold in pursuance of the trusts aforesaid, "the same premises respectively shall be held, possessed, and enjoyed, and the rents, issues, and profits thereof shall be had and received and taken by, and be applied to and for the benefit of, such person and persons as would have been entitled thereto and ought to have held, possessed, or enjoyed and received the same respectively in case this act had not been made."

The lands have in fact continued unsold down to the present day. John, Earl of Shrewsbury, being the person who, if the act of 43 Geo. 3, c. xl., had not been made, would have been the tenant in tail under the settlement and act confirming it, and who was consequently the cestui que trust, under the 7th section of the 43 Geo. 3, c. xl., granted a lease of some of the lands comprised in the schedule for a term of years determinable on three lives, which term is not yet expired. This lease would have been in pursuance of the power contained in the 10th section of the 6 Geo. 1, c. xxix., if that power had still continued.

John, Earl of Shrewsbury, being dead, the question in the case is, whether that lease is valid as against the present Earl of Shrewsbury and the trustees under the 43 Geo. 3, c. xl.

The argument of Sir Hugh Cairns, for the plaintiffs in error, was, that the fines which the tenant in tail for the time being might receive on taking a surrender of the lease and granting a new one, were a part,—perhaps a considerable part, but certainly a part,—of the profits which before the passing of the 43 Geo. 3, c. xl., would be received by the tenant in tail; and that an estate cannot be so profitably enjoyed when there is no power to grant leases as when there

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is a power; both of which propositions seem perfectly accurate. And from this he drew the conclusion, which we think legitimate, that, if the effect of the 43 Geo. 3, c. xl., was, to prevent the granting of any lease except one liable to be determined either by the death of the cestui que trust who granted it, or by a sale by the trustees, the tenants under these precarious leases would not pay so much rent as if they had a more certain tenure, and of course would pay no fines; and so the cestui que trust in possession under the 7th section of the 43 Geo. 3, c. xl would not receive as much profit from the unsold lands as he would have received if he had continued tenant in tail under the 6 Geo. 1, c. xxix.

It is probable that, if those who framed the 43 Geo. 3, c. xl., had foreseen that the lands would continue unsold for sixty-three years, these considerations would have led them to give to the cestui que trust some power of leasing. But Sir Hugh Cairns then argued that a power of leasing co-extensive with the power contained in the 6 Geo. 1, c. xxix., s. 10, must, by implication be given by the 43 Geo, 3, c. xl.; and there we are unable to assent to the argument.

No lease by any cestui que trust could be good, after the lessor's estate determined by his death, against the trustees for his successor, unless it would also be good against a purchaser from those trustees. Now, s. 1 in very clear terms enacts that a purchaser from those trustees shall have the estate free from everything, "except only such leases as have been heretofore (*i.e.* in 1803) made or granted of the same respectively in pursuance of the powers contained in the said settlement and act of parliament." It is true that, if a power to grant leases was subsequently given by the 43 Geo. 3, c. xl., the purchaser could not have the estate freed from a lease created under that power; but he would have some right to complain if the legislature created such a power by any but clear words; it would look as if the legislature set a snare for the purchaser; and we ought to bear this in mind in construing the act, and not to impute to the legislature such an intention, unless clearly shewn.

Now, s. 7 provides that, until sale, the lands shall be possessed by the person who would otherwise have possessed them, and that the profits thereof shall be enjoyed by the person who would have enjoyed

the same if this act had not been made. It does not even say that the same profits shall be enjoyed to the same extent, nor that as ample profits shall be made, as if the act had not been passed,—phrases which would have given some countenance to the defendants' argument; but simply provides that the profits shall be enjoyed by the same person. The argument for the plaintiffs in error requires us to add by implication a clause to this effect,—"and, for the purpose of making those profits as large as heretofore, the cestui que trust shall have the same power of leasing which but for the passing of this act he would have had as tenant in tail, and the trustees shall convey the lands to a purchaser subject to all leases granted under this new power, as well as to those heretofore granted under the power referred to in the first section of this act." If we did this, we should add a provision which we think the legislature had no intention to add, and which we are sure they have not expressed any intention to add.

We therefore think that the judgment below was right, and should be affirmed.

Judgment affirmed. (1)

Attorneys for plaintiffs: *Nicholson & Herbert.*

Attorneys for defendants: *Norris & Allen, agents for Simpson & North, Liverpool.*

(1) The case of *The Earl of Shrewsbury* v. *Harbord*, 19 C. B. (N.S.) 643, was taken to be disposed of by the decision in the principal case. The argument of *The Earl of Shrewsbury* v. *Beazley*, 19 C. B. (N.S.) 651, was postponed; and ultimately the case was compromised.

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Nov. 7.

DEFFELL AND ANOTHER *v.* WHITE.

Bill of Sale—Attesting Witness—Bills of Sale Act (17 & 18 *Vict.* c. 36), s. 1.

A company gave a bill of sale of all its property to trustees for certain debenture holders.

By a resolution of the directors of the company, it had been provided that the seal of the company should be affixed to documents only in the presence of two directors, who were to *attest* it by their signatures. The deed was sealed with the seal of the company, and adjoining the seal were the words: "Seal of the said company, affixed at a board meeting this 23rd day of June, 1865, in the presence of R. Banner Oakeley, Chairman; R. J. Chilton, Director. Countersigned—Chas. B. Davies, Secretary pro tem."

There was no other attesting witness. The bill of sale was duly registered, but the affidavit filed with it contained only the address of Chas. B. Davies, and not that of R. B. Oakeley or of R. J. Chilton:—

Held, that the latter were not attesting witnesses, because they did not attest an execution of the deed already completed, their signatures forming part of such execution; and that the affidavit was therefore sufficient, and the bill of sale good.

Shears v. *Jacob* (Law Rep. 1 C. P. 513) approved of.

THIS was an interpleader issue tried before Byles, J., at the first sittings in Middlesex, in Trinity Term.

It appeared at the trial, that The Opera Company, Limited, being desirous of raising money on debentures, executed a bill of sale of all the property of the company to the plaintiffs as trustees for the debenture holders. The directors had some time previously passed the following resolution:—"That the seal of the company be under two locks, and that the keys of such locks shall be kept by two of the directors, and the seal shall be affixed to documents only in the presence of two directors, and such affixing shall be attested by their respective signatures." The seal of the company was accordingly affixed to the bill of sale, in the presence of two directors, who signed their names in the following form:—

"Seal of the said company affixed at the Board Meeting, this 23rd day of June, 1865, in the presence of

"R. Banner Oakley, *Chairman.*

"R. J. Chilton, *Director.*

(Countersigned) "Charles B. Davies, *Secretary pro tem.*"

There was no other attesting witness to the deed. The bill of

sale was duly registered, and an affidavit filed with it which contained the address of Charles B. Davies, but not that of R. Banner Oakley, or of R. J. Chilton.

A verdict was found for the defendant, with leave to the plaintiffs to move to enter the verdict on the ground, amongst others, that the two directors were not attesting witnesses, and that the affidavit, therefore, complied sufficiently with the requirements of the Bills of Sale Act (17 & 18 Vict. c. 36), s. 1.

A rule having been obtained accordingly,

Hayes, Serjt., and *Lewers*, shewed cause. The two directors were attesting witnesses, and the affidavit filed at the registration of the bill of sale should have contained their addresses, and as it did not do so, the bill of sale is void as against creditors under the provisions of 17 & 18 Vict. c. 36, s. 1: the case of *Shears* v. *Jacob* (1) is distinguishable, because there was in that case no attestation clause, and no rule of the company requiring two directors to attest by their signatures the affixing of the company's seal.

Denman, Q.C., and *G. W. Harrison*, in support of the rule. The names of the directors were signed as part of the execution of the deed, and form with the seal of the company one complex signature. The company have made a rule, as they were entitled to do, which amounts, really, to saying that the signature of the company shall be its seal and certain writing, and the names in question form part of that writing. In the case of *Doe* v. *Chambers* (2), the signature of the secretary to the company was held not to be that of an attesting witness for that reason. The act speaks of the attestation of *the execution* of the bill of sale, and it is only witnesses that attest such execution who come within the provisions of the act; but the signatures in this case attested the affixing of the seal, not the execution of the deed. The case of *Shears* v. *Jacob* (1), is a direct authority in favour of the plaintiffs, the present being in fact an a fortiori case on account of the rule which required two directors always to attest by their signatures the affixing of the company's seal.

ERLE, C.J. I think that this rule should be made absolute,

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and that the registration of the bill of sale was valid. By 17 & 18 Vict. c. 36, s. 1, it is required that an affidavit shall be filed at the registration of a bill of sale, containing the addresses of every attesting witness. In this case a bill of sale was executed by a corporation, and close to the seal of the company were the words, "Seal of the said company affixed at the board meeting this 23rd day of June, 1865, in the presence of ——," followed by the signatures of two directors. The affidavit filed with the bill of sale does not contain the addresses of these two directors, and the question is, whether they were attesting witnesses. Previous to the passing of the Bills of Sale Act, there were very definite rules distinguishing who was and was not an attesting witness; but in that session an act was passed rendering unnecessary those nice distinctions, which had been amongst the most frequent causes of the miscarriage of justice. The expression "an attesting witness," however, may be taken to imply that there is one person executing the deed, and another and distinct person attesting that completed execution; and the contention for the plaintiffs in this case is, that the two directors put their names to the deed as part of the execution of it, and not to attest an execution already completed. The articles of association of the company contained a rule that the seal of the company should be affixed in the presence of two directors, who should attest the affixing of the seal, the real meaning of which was, not that they were to be attesting witnesses in the sense above given, but that they should sign their names as part of the execution of the instrument, that the shareholders might know who were the two directors in whose presence the seal was affixed. I think this question may be almost considered as res judicata after the case of *Shears* v. *Jacob* (1); and there is a case, *Doe* v. *Chambers* (2), in which the secretary had signed his name by the side of the seal of a company, and the Court held that his signature was only meant to imply that the seal had been affixed by order of the directors, and that it therefore formed part of the execution of the instrument, without which it would not, though valid, have been in the usual form.

WILLES, J. I am of the same opinion. The mere fact that the

(1) Law Rep. 1 C. P. 513. (2) 4 A. & E. 410.

directors are said to attest the placing of the seal, does not make them attesting witnesses within the meaning of the 17 & 18 Vict. c. 36. The distinction between attesting witnesses and those who, though said to attest, are not technically attesting witnesses, is of early origin, and may have originated in the distinction between deeds which ended "these being witnesses," in which they were really attesting witnesses, and necessary often to the force of the deed, and grants from the Crown, which ended "witness ourselves," though such words were in no way necessary. In every deed now it is usual to prefix to the signature of the person making the deed the words "in witness whereof I have signed," and the person signing the deed does become in one sense an attesting witness of the deed by signing it, but certainly he is not an attesting witness in the ordinary and technical sense, because that is confined to the case of a person attesting the act of another, and is not applied to a person attesting his own act. This is shewn by the case of *Doe* v. *Chambers*. (1) There, as the secretary was really the hand through which the corporation which made the deed acted, it was held that his signature was not that of an attesting witness. Of course, the corporation and the directors are distinct persons in law, but the corporation having no limbs must act through some one, and here it acts through the persons of the directors. We must be further satisfied that the Bills of Sale Act uses the term attesting witness in the above technical sense; but of this I think there can be no doubt, especially as the act which abolished the rule respecting attesting witnesses, though passed the same session was passed after the Bills of Sale Act. No question arises with respect to the signature of the secretary in this case, as his address is given in the affidavit which was filed.

BYLES, J. My great respect for the opinions of my Lord Chief Justice and my Brother Willes leads me to concur, though not without great doubt.

KEATING, J. I concur in the opinions that have been expressed. I think the distinction was well pointed out by the Lord Chief Justice, when he said, that the two directors signed their names as

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part of the execution of the instrument, and not to attest an execution already completed.

Rule absolute.

Attorneys for plaintiffs: *Monkton & Monkton.*
Attorneys for defendant: *Lewis & Sons.*

Nov. 5.

HOWARD *v.* SHEWARD.

Principal and Agent—Authority of Agent to bind his Principal—Horse-Dealer—Warranty on Sale of a Horse—Usage of Trade—Evidence, admissibility of.

The agent or servant of a horse-dealer has an implied authority to bind his principal or master by a warranty, even though (unknown to the buyer) he has express orders not to warrant.

Evidence of a general practice amongst horse-dealers not to warrant where the horse has been examined by a veterinary surgeon and certified by him to be sound, is not admissible to rebut the inference of authority to warrant.

THIS was an action for an alleged breach of warranty on the sale of a horse, and for money had and received. Pleas, not guilty, and never indebted.

The cause was tried before Erle, C.J., at the sittings in London after last Trinity Term, when it appeared that the defendant was a horse-dealer, and that in March, 1866, the plaintiff, being at a riding-school, asked the proprietor "if he knew of a horse that would be likely to suit him," and that David Sheward, the brother of the defendant, who happened to be present, and who was himself a horse-dealer, and occasionally acted in the sale of horses for the defendant, said he thought the latter had one. After some conversation, the horse in question was brought to the riding-school, and was there ridden by the plaintiff and approved of by him; and David Sheward, in answer to questions as to the character and soundness of the animal, said, "I'll guarantee the horse is sound." Ultimately the horse,—which had at the plaintiff's request been previously examined by a veterinary surgeon, who gave a certificate that it was sound,—was purchased by the plaintiff for 315*l.*, which sum he paid to the defendant. The horse proving to be unsound, was re-sold by the plaintiff, and this action was brought to recover the difference in price.

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There was a conflict of evidence as to whether or not the horse was sound when he left the defendant's stables.

On the part of the defendant it was contended that the servant of a horse-dealer (assuming David Sheward to have been the defendant's servant for this purpose) has no implied authority to warrant on his master's behalf; and evidence was offered, and amongst other that of David Sheward himself, for the purpose of shewing that the defendant had expressly desired him not to warrant the horse; but it was not suggested that this had been communicated to the plaintiff.

Evidence was also offered to shew that it was not the custom with horse-dealers to warrant, where the horse had been examined by a competent veterinary surgeon and pronounced sound.

His Lordship declined to receive the evidence, and said that he should rule that David Sheward had authority to warrant; and the jury, finding that he had done so, and that the horse was unsound, returned a verdict for the plaintiff, damages 127*l.* 10*s.*, and leave was reserved to the defendant to move to enter a nonsuit.

Hawkins, Q.C., moved, pursuant to the leave reserved, to enter a verdict for the defendant or a nonsuit, or for a new trial on the ground of misdirection and improper rejection of evidence, and that the verdict was against the weight of evidence. The servant or agent of a horse-dealer has no implied authority to warrant the soundness of a horse which he sells; this Court, in *Brady* v. *Todd* (1), expressly declined to affirm that he has. The utmost extent of his implied authority is, to agree for the price. There was no evidence to shew that David was the general servant of the defendant, or even that he had authority to sell the horse. At all events, the evidence which was offered for the purpose of shewing that David was expressly desired not to warrant, and that there was a well-known usage amongst horse-dealers not to warrant where the horse had been examined by a veterinary surgeon and pronounced sound, was admissible.

[WILLES, J. That would be rather a habit than a usage.

KEATING, J. Would the fact of David Sheward being desired

(1) 9 C. B. (N.S.) 592; 30 L. J. (C.P.) 223.

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not to warrant the horse affect the question, if in fact he did warrant it?]

It would negative the implied authority, if any, to warrant.

[ERLE, C.J. I rejected the evidence because I thought the practice of other horse-dealers had nothing to do with the issue before the jury.

WILLES, J., referred to *Hollingham* v. *Head* (1), where, in an action for goods sold and delivered, the question being whether the sale was absolute or subject to a condition, it was held not to be competent to the defendant to call witnesses to prove that the plaintiff had made contracts with other persons subject to the condition suggested.]

Then, the verdict was manifestly contrary to the evidence, as well upon the question of warranty as upon the condition of the horse at the time it left the defendant's stables.

[ERLE, C.J. There was evidence both ways; and it was a case entirely for the decision of the jury.]

WILLES, J. I am of opinion that there ought to be no rule. As to the objection that the verdict was against the weight of evidence, I think our decision should be in accordance with the opinion of the Chief Justice. The question was one peculiarly for the consideration of the jury. There was considerable evidence on both sides: and my Lord is not dissatisfied with the conclusion the jury came to. It is not usual under such circumstances to take a case out of the hands of the tribunal to which the law has entrusted the decision of matters of fact. Then, a new trial is asked for on the grounds of misdirection and the improper rejection of evidence. The supposed misdirection consists in the Chief Justice telling the jury that there was evidence of authority in David Sheward, the defendant's brother, to warrant the horse. The character of the transaction seems to have been this:—The plaintiff was a gentleman in search of a horse; and the defendant is a large horse-dealer, having a horse to sell. Meeting David Sheward, the defendant's brother, at the place of business of another person, the plaintiff had a conversation with him, in the course of which David Sheward intimated that his brother had a

(1) 4 C. B. (N.S.) 388; 27 L. J. (C.P.) 241.

horse which would be likely to suit the plaintiff, and he professed to have authority to negotiate a sale. David Sheward was himself carrying on the business of a horse-dealer on his own account: and it cannot be out of the scope of a horse-dealer's business to give a warranty, if a warranty may ordinarily form part of the transaction between buyer and seller. In the result, David Sheward did sell the horse to the plaintiff with a warranty of soundness: and it turned out that the horse was not sound. The defendant received the price. David Sheward did not negative the fact that this was an ordinary transaction as between his brother and himself. It must be assumed, therefore, that he negotiated the sale as his brother's agent or servant. It was not an isolated instance, though if it had been, I do not conceive that it would have made any difference: but it appeared that David Sheward had before occasionally assisted the defendant in the sale of horses. Is it, then, part of the business of a horse-dealer to warrant horses which he sells? No doubt it is where a sufficient price is given. Upon the whole I think there was clear evidence of authority to warrant. It arose out of the general character of the transaction, and any person dealing with the agent of a horse-dealer has a right to assume it. It was an ostensible authority, which could not be negatived by shewing a secret understanding between the horse-dealer and his servant that the latter was not to warrant. The case of *Brady* v. *Todd* (1), which has been referred to, sustains that proposition. The Court there declined to extend the rule to a single transaction of sale by the servant of a private individual, because in such a case the buyer has no right to presume any authority in the servant beyond that which is apparent on the particular occasion. All the cases are collected in the excellent work of Mr. Oliphant on Horses, 3rd ed. 124, et seq., and the rule he deduces from them is, that, "if the servant of a horse-dealer, with express directions not to warrant, do warrant, the master is bound; because the servant, having a general authority to sell, is in a condition to warrant, and the master has not notified to the world that the general authority is circumscribed." That introduces the second objection which has been made by the defendant, because it shews that the evidence tendered by Mr. Hawkins of the supposed usage amongst

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horse-dealers never to warrant where the horse has been examined by a veterinary surgeon and pronounced by him to be sound, if not objectionable on the ground of remoteness, which I think it was, after all amounted only to a tacit direction from the principal to his agent not to warrant on this particular occasion, which, for the reasons I have already given, would not prevent that which passed between the agent and the buyer from enuring as a warranty, if that direction were disregarded. Upon neither ground, therefore, do I find any sound objection to the ruling of the Chief Justice.

BYLES, J. I am of the same opinion. The rule to be deduced from the case of *Brady* v. *Todd* (1) seems to me to be this,—if the servant or agent of a private individual entrusted on one occasion to sell a horse, without authority from his master takes upon himself to warrant the soundness of the animal, the master is not bound; but, if the servant of a horse-dealer, or even one who only occasionally assists him in his business, being employed to sell, gives a warranty, the principal is bound, even though the agent or servant was expressly forbidden to warrant. In such a case, there is an ostensible authority to do that which is usual in the conduct of the business of a horse-dealer. The question whether there was an actual warranty here or not went to the jury, and they disposed of it in a way with which my Lord is not dissatisfied. The evidence of the supposed custom or usage not to warrant where a horse had been examined and certified to be sound, was mere evidence of bargains between other persons, and was clearly inadmissible.

KEATING, J. I am of the same opinion. The defendant, a horse-dealer, employed his brother to sell the horse in question, and clothed him with full power to do all that is properly within the scope of the authority of a person so employed. The agent warranted the horse to be sound. By that warranty the defendant is bound.

ERLE, C.J., concurred.

Rule refused.

Attorneys for plaintiff: *Paterson & Sons.*

Attorneys for defendant: *Tamplin & Tayler.*

(1) 9 C. B. (N.S.) 592; 30 L. J. (C.P.) 223.

COWARD AND ANOTHER, ASSIGNEES OF THOMAS GORTON, A BANKRUPT, *v.* GREGORY, EXECUTOR OF JOHN HALL, DECEASED. 1866 *Nov.* 13.

Landlord and Tenant—Covenant to repair—Condition Precedent—Continuing Breach—Recovery in former Action—Liability of Executor of an Executor for a Devastavit by the latter.

1. By an indenture of lease made in 1851, Richard Hall demised to one Gorton certain print-works and premises, with the steam-engines, boilers, &c., belonging thereto, the lessee covenanting to keep the premises in good and tenantable repair, "the main walls, roofs, slates, principal timbers, and the outside parts of the said buildings, &c., and accidents by fire, lightning, &c., and the steam-engines, boilers, water-wheels, and first motion therefrom, respectively, by the fair and reasonable wear and usage thereof, only excepted," he the said Richard Hall having first put the premises into good and tenantable repair, pursuant to the covenant hereinafter entered into by him: and the lessor covenanted with the lessee that he, his heirs, &c., would forthwith put the premises into good and tenantable repair, and would during the term keep and maintain "the whole of the main walls, roofs, slates, and principal timbers of the premises, and the steam-engines, water-wheels, and first motion therefrom, by the fair and reasonable wear and usage thereof, in good and tenantable repair," &c.

In an action by the assignees of the lessee (who had become bankrupt) against the defendant, as executor of John Hall, who was assignee of the reversion of Richard Hall, the lessor, the first count of the declaration assigned two breaches,—first, the lessor having omitted to do so, that John Hall after he became assignee did not put the demised premises, or any part thereof, into good and tenantable repair, —secondly, that John Hall, whilst such assignee, did not keep and maintain the said main walls, roofs, slates, and principal timbers of the premises, and the said steam-engines, &c., by the fair and reasonable wear and usage thereof, in good repair, &c.

The defendant pleaded to the first breach,—fifthly, that John Hall became assignee of the reversion by reason of the death of Richard Hall; that, in the life-time of Richard Hall, and before John Hall became such assignee, a reasonable time had elapsed, and all things had happened to entitle the lessee to have the covenant to put the premises into repair performed by the lessor; and that the covenant was wholly broken before John Hall became such assignee,—sixthly, repeating the last plea, and further, that, after the death of Richard Hall, the lessee sued John Hall and one Ramsbottom, as executors of Richard Hall, for the said breach of covenant by Richard Hall, and recovered by an award 1080*l.* 2*s.* as damages in respect of that and the second breach of covenant, that the award was a valid and binding award, and that the sum awarded, with costs, had been paid to Gorton before his bankruptcy:—

Held, that the fifth and sixth pleas were a good answer to the first breach, inasmuch as there could only be one breach of the covenant to put the premises into repair, and that had occurred in the life-time of Richard Hall.

2. To the second breach,—eighthly, that Gorton sued John Hall and recovered damages against him for a breach of the same covenant, and that the want of re-

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pair complained of in the same breach was only a continuance of the want of repair in respect of which such damages were awarded,—ninthly, for defence on equitable grounds, a repetition of the allegations in the sixth and eighth pleas, and further that Gorton did not expend the sum so recovered in putting the premises into repair, and that if he had done so, the want of repair complained of in the second breach would not have occurred:—

Held, that the eighth and ninth pleas were no answer, as this was a continuing breach, and the former recovery was no bar, even upon equitable grounds, but only matter in mitigation of damages.

3. The defendant further pleaded to the second breach,—tenthly, that such breach was caused by the default of Gorton in not keeping the demised premises (the main walls, &c., and the steam-engines, &c., excepted) in repair according to his covenant. Replication, that the demised premises never were put into repair pursuant to the lessor's covenant:—

Held, that the covenant by the lessor to put the premises into repair was a condition precedent, and therefore that the replication was an answer to the plea.

4. Eleventh plea, to the second breach, that the want of repair complained of was not occasioned by fair and reasonable wear and usage:—

Held, that the plea was bad, as the words in the covenant, "by the fair and reasonable wear and usage thereof," applied only to the "steam-engines, boilers, water-wheels, and first motion therefrom."

5. Twelfth plea, to both breaches, that John Hall had no notice of the want of repair:—

Held, that want of notice was no answer, at all events, to the first breach.

6. The second count alleged that Gorton recovered by the judgment of a court of error against John Hall as executor of Richard Hall, de bonis testatoris, in an action for breach of covenant by Richard Hall, 1322*l.* 11s., and that John Hall was guilty of a devastavit to the extent of the judgment so recovered. To this count the defendant pleaded that the judgment of the court of error was not entered up within two terms after the verdict:—

Held, bad, as being an attempt to call in question the judgment of a court of error.

7. Sixteenth plea, to the second count, that Richard Hall appointed John Hall and one Ramsbottom his executors, that Ramsbottom was at the time of the death of John Hall still living, that John Hall had at the time of his death, and that after his death Ramsbottom had in his hands personal estate and effects of Richard Hall sufficient to satisfy the judgment, and that the defendant had never had any personal estate and effects of Richard Hall in his hands as executor to be administered:—

Held, that the plea was bad, the defendant being responsible as executor for the devastavit by John Hall, which the plea admitted.

THE declaration by the plaintiffs as assignees of one Thomas Gorton, a bankrupt, against the defendant as executor of John Hall, in the first count, stated that, before Gorton became a bankrupt, to wit, &c., by an indenture between one Richard Hall of the one part, and Gorton of the other part, Richard

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Hall demised to Gorton certain print-works, buildings, and tenements then used by Gorton as print and dye-works, as in the indenture mentioned, with the steam-engines, boilers, shafting, gearing, and apparatus belonging thereto, and also certain cottages, warehouses, barns, shippens, and stables belonging thereto, and then occupied therewith by Gorton; and also certain bleach-works and other buildings; and also certain articles, matters, and things particularly mentioned and specified in a schedule or inventory thereof in the indenture mentioned; To hold the said premises for the several and respective terms of years in the indenture mentioned as to such several parcels thereof respectively as in the indenture mentioned: And Gorton did thereby, for himself, his heirs, &c., covenant with Richard Hall, his heirs, &c., that he, Gorton, his executors, &c., would, during the several terms for which the same respectively were thereby demised, maintain and keep the several hereditaments, tenements, and premises thereby demised in good and tenantable order, repair, and condition,—the main walls, roofs, slates, principal timbers, and the outside parts of the said buildings, and accidents by fire, lightning, flood, storm or tempest, and the said steam-engines, boilers, water-wheels, and first motion therefrom, respectively, by the fair and reasonable wear and usage thereof, only excepted,—he the said Richard Hall, his heirs, &c., having first put the whole of the several hereditaments, tenements, and premises thereby demised into good and tenantable order, repair, and condition, pursuant to the covenant thereinafter entered into by him for that purpose, as thereinafter mentioned: And Richard Hall did thereby, for himself, his heirs, &c., covenant with Gorton that he Richard Hall, his heirs, &c., should and would forthwith put the whole of the demised premises into good and tenantable order, repair, and condition, and during the whole of the said several terms keep and maintain the whole of the main walls, roofs, slates, and principal timbers of the said several buildings and premises, and the steam-engines, boilers, water-wheels, and first motion therefrom, by the fair and reasonable wear and usage thereof, in good and tenantable order, repair, and condition; and also should once in every four years paint the window-frames and the entire outside wood and iron-work of the said buildings and premises thereby demised with good and sufficient oil paint: That by

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virtue of the said demise Gorton entered upon the premises, and became possessed thereof respectively for the several terms so granted to him: That afterwards and during the several terms, and in the life-time of John Hall, and before Gorton became a bankrupt, and before the committing of the breaches of covenant thereinafter mentioned, the several reversions of and in the demised premises expectant on the determination of the several terms, by assignment came to and vested in John Hall: That, although Gorton did not become bankrupt nor John Hall die until after the expiration of the several terms, and although all things were done and all things happened and existed, and all times elapsed necessary to entitle Gorton, after John Hall became such assignee of the said reversions as aforesaid, to have the said covenants of Richard Hall, for himself and his assigns, performed by John Hall, and to maintain this action for the non-performance of the same; and although Richard Hall did not nor would, before John Hall became such assignee of the said reversions as aforesaid, perform the said covenant to put the whole of the demised premises into good and tenantable order, repair, and condition; and although the said premises, when John Hall became such assignee of the said reversions as aforesaid, were, and every part thereof was, out of repair; yet John Hall did not nor would, after he became and whilst he was such assignee as aforesaid, put the demised premises or any part thereof into good and tenantable repair, order, and condition, but neglected and refused so to do: That John Hall did not nor would after he became and whilst he was such assignee as aforesaid, and during the several terms, keep and maintain the whole of the said main walls, roofs, slates, and principal timbers of the said buildings and premises, and the said steam-engines, boilers, water-wheels, and first motion therefrom, by the fair and reasonable wear and usage thereof, in good and tenantable order, repair, and condition; but, from the time when he became and whilst he was such assignee as aforesaid, and during the said terms, and until the expiration thereof, suffered and permitted the said main walls, roofs, slates, and principal timbers of the said buildings and premises, and also the said steam-engines, boilers, water-wheels, and first motion therefrom, by the fair and reasonable wear and usage thereof, to become and be and continue, and the same were for and during all

the time aforesaid, ruinous, prostrate, dilapidated, and in great decay, and in bad and untenantable order, repair, and condition, for want of the necessary and proper keeping and maintaining of the same in good and tenantable order, repair, and condition, according to the covenant in that behalf: That John Hall, after he became and whilst he was such assignee as aforesaid, and during the said several terms, did not nor would once in every four years of the said several terms paint the window-frames and the entire outside wood and iron-work of the said buildings and premises thereby demised with good and sufficient oil-paint, according to the covenant in that behalf; but, after the 19th of October, 1854, and during two such periods of four years respectively, wholly neglected and omitted so to do, although all things happened and all times elapsed necessary to entitle Gorton to have had the same twice so painted by John Hall as aforesaid, and to entitle the plaintiffs to maintain this action in respect of the said breaches of covenant by John Hall in that behalf; and thereby the window-frames and outside iron and wood-work became and were rotten and spoiled. The count then alleged for special damage that Gorton was by reason of the breaches of covenant by John Hall prevented from carrying on his business of a calico-printer in so profitable and advantageous a manner as he otherwise might and would have done; that the steam-engines, boilers, and water-wheels, and first motion therefrom, were out of working condition, and Gorton's business was consequently obstructed and stopped; that the demised premises were thereby rendered unfit for the introduction into the works of improved machinery, which improved machinery it was in and by the lease provided that Gorton should be authorized to substitute for any of the machinery therein mentioned, in manner and upon the terms therein mentioned; and that Gorton was thereby prevented from substituting and introducing such new machinery, and was put to expense in making divers of such reparations as John Hall as such assignee ought to have made according to the covenants in that behalf, and was otherwise damnified in his business and circumstances, &c.

The second count stated that John Hall was in his life-time and at the time of his death executor of Richard Hall, and that after the death of Richard Hall and in the life-time of John Hall, to

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wit, on the 23rd of October, 1860, Gorton commenced an action in the Court of Queen's Bench (1) against John Hall for a breach by Richard Hall of the covenant in the lease of the 8th of March, 1851, to pay to Gorton at the expiration of the term the sum awarded by an umpire as the excess in value of the machinery &c. then upon the premises, over their value (after allowing for reasonable wear and tear) at the date of the indenture; that the cause came on for trial at the Liverpool summer assizes, 1861, when a verdict was found for Gorton for 1142*l.* 2*s.* 11*d.* damages, costs 40*s.*; that John Hall died after the commencement of and during the said assizes, having duly made his will, and appointed the defendant and one Ramsbottom executors thereof; that Ramsbottom renounced probate, and the will was proved by the defendant; that, within two terms after such verdict, to wit, on the 23rd of January, 1862, judgment was entered against the defendant in that action for the sum assessed by the jury, and also 180*l.* 8*s.* 1*d.* for costs, together 1322*l.* 11*s.*; that, after the death of John Hall, error was brought upon that judgment by the now defendant, and by a rule of the court of error it was ordered that the judgment as against the defendant John Hall de bonis propriis should be reversed, and a judgment against him as executor, de bonis testatoris, et si non, as to costs, de bonis propriis, should be entered instead thereof; that such judgment was entered accordingly, and remained in full force and effect, not in the least reversed, annulled, set aside, paid off, or satisfied; that, after the death of Richard Hall, and before Gorton became bankrupt, John Hall eloigned, wasted, converted, and disposed of to his own use divers goods and chattels which were of Richard Hall, deceased, at the time of his death, of the value of the said sum of 1322*l.* 11*s.* recovered as aforesaid, and which came to the hands of John Hall, as executor as aforesaid, to be administered; whereby, in the life-time of John Hall, and before Gorton became bankrupt, an action accrued to Gorton to demand and have of John Hall the said sum of 1322*l.* 11*s.* &c.

Fifth plea,—to the first breach,—that John Hall became assignee of the said reversions upon and by reason of the death of Richard Hall; that, after the making of the indenture, and in the life-time

(1) The record in that action was set out at length.

of Richard Hall, and before John Hall became such assignee, a reasonable time and all things had elapsed and happened necessary to entitle Gorton to have the covenant to put the whole of the demised premises into good and tenantable order and condition performed by Richard Hall; and that the said covenant was wholly broken before John Hall became such assignee.

Sixth plea,—to the first breach,—a repetition of the last preceding plea, and further that after the death of Richard Hall, and before the expiration of the said terms, Gorton sued John Hall and Ramsbottom, as and being the executors of Richard Hall, in the Court of Exchequer, in an action for and in respect of the said breach by Richard Hall of the said covenant, and for and in respect of Richard Hall not having in his life-time kept and maintained the said main walls, roofs, slates, and principal timbers of the said buildings and premises, and also the said steam-engines, boilers, water-wheels, and first motion, by the fair and reasonable wear and usage thereof, in good and tenantable order, repair, and condition; that the said action and all matters in difference were referred to one James Park, who before Gorton's bankruptcy made an award in his favour for 1080*l.* 2*s.* as damages "in the said action and in respect of the said breaches of covenant;" that the award remained a valid and binding award; and that the sum awarded and the costs of the action, &c., were paid to and received by Gorton before his bankruptcy.

Seventh plea,—to the second breach,—that, before the expiration of the said terms, Gorton sued John Hall, in the Court of Exchequer, as such assignee of the said reversions, in an action for and in respect of John Hall not having as such assignee kept and maintained the said main walls, roofs, slates, and principal timbers of the said buildings and premises, and the said steam-engines, boilers, water-wheels, and first motion therefrom, by the fair and reasonable wear and usage thereof, in good and tenantable order, repair, and condition, &c.—stating a reference and award, and payment of the sum awarded, as in the sixth plea.

Eighth plea,—to the second breach,—a repetition of the last preceding plea except so much thereof as alleged that the action was for and in respect of the same breach of covenant as in that plea pleaded to; and further that the want of repair and bad and

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untenantable order, repair, and condition in the declaration, so far as respected the breach of covenant therein pleaded to, complained of, was and is the continuance only of such want of repair, and bad and untenantable order, repair, and condition for and in respect of which the said action was brought and the said damages awarded against John Hall, and which existed at the time of the commencement of the said action.

Ninth plea, for defence on equitable grounds as to the second breach,—a repetition of the sixth and seventh pleas, except so much of the seventh plea as alleged that the action in that plea mentioned was for and in respect of the same breach of covenant as in the seventh plea pleaded to; and further that Gorton did not, although a reasonable time for that purpose had elapsed before the expiration of the said terms, expend the sums so awarded and paid to him as in the sixth and seventh pleas mentioned, upon the demised premises, or in or about putting the same, nor did he put the same, into good and tenantable order, repair, and condition; that, if Gorton had so expended the said moneys, or put the demised premises into good and tenantable order, repair, and condition, such want of repair and bad and untenantable order, repair, and condition as in the declaration, so far as respected the breach of covenant therein pleaded to, complained of, would not have existed or occurred; and that the breach of covenant therein pleaded to was thereby occasioned by the default of Gorton.

Tenth plea,—to the second breach,—that the said breach was caused and occasioned by the acts and defaults of Gorton in not maintaining and keeping the demised premises in good and tenantable order and condition (the main walls, roofs, slates, principal timbers, and the outside parts of the said buildings, and accidents by fire, lightning, flood, storm, or tempest, and the steam-engines, boilers, water-wheels, and first motion therefrom respectively, by the fair and reasonable wear and usage thereof, only excepted), according to his covenant in that behalf in the indenture contained.

Eleventh plea,—to the second breach,—that such want of repair and bad and untenantable order, repair, and condition in the declaration, so far as respected the breach of covenant therein

pleaded to, complained of, were not occasioned by fair and reasonable wear and usage.

Twelfth plea,—as to both breaches in the first count,—that John Hall had not notice of such want of repair, and bad and untenantable order, repair, and condition, as in the declaration complained of.

Fifteenth plea,—to the second count,—that the judgment of the court of error was not entered within two terms after the said verdict.

Sixteenth plea,—to the second count,—that Richard Hall by his last will appointed John Hall and one Ramsbottom executors thereof; that John Hall and Ramsbottom duly proved the last will and testament of Richard Hall, and took upon themselves the burden of the execution thereof; that Ramsbottom was at the time of the death of John Hall, and still is, living; that, at the time of the death of John Hall, the said John Hall had in his hands, and upon and after his death Ramsbottom had in his hands, personal estate and effects of Richard Hall sufficient to satisfy the said judgment; and that the defendant had never had, nor at the commencement of this suit had he, nor had he since had, nor had he then, any personal estate or effects which were of Richard Hall, in his hands as executor as aforesaid to be administered.

The defendant also demurred to the second count, on the ground that the judgment therein set out appeared on its face to be erroneous, and that the facts set forth in the second count did not shew any liability on the part of the defendant. Joinder.

Second replication to the tenth plea,—that the demised premises never were put into good and tenantable order, repair, and condition, pursuant to the covenant in that behalf of Richard Hall.

The plaintiffs also demurred to the fifth and sixth pleas, on the ground that "there was a continuing breach of the covenant so long as the premises were not put into good repair;" to the eighth plea, on the ground that "the breach secondly assigned is a continuing breach up to the time of the expiration of the tenancy;" to the ninth plea, on the ground that "it shews no sufficient reason for restraining the plaintiff's action;" to the eleventh plea, on the ground that, "consistently with what is stated in that plea,

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there may have been the breach of covenant secondly assigned, and that that plea neither denied nor confessed and avoided;" to the twelfth plea, on the ground "that notice of want of repair was not a condition precedent;" to the fifteenth, on the ground that "it appeared from the declaration that the judgment of the court of error was a substitution for the original judgment;" and to the sixteenth, on the ground that "the defendant, being charged upon a devastavit by John Hall, that plea was no answer." Joinder.

The defendant demurred to the second replication to the tenth plea, on the ground that "it states matter only for cross-action, and is no answer to the plea." Joinder.

Kemplay (*Herschell* with him), for the plaintiffs. The first count of the declaration sets out a lease by Richard Hall to Gorton of certain print-works and premises, with the steam-engines, boilers, &c., belonging thereto, whereby the lessee covenants to keep the premises in repair, "the main walls, roofs, slates, principal timbers, and the outside parts of the said buildings, &c., and the steam-engines, boilers, water-wheels, and first motion therefrom, respectively, by the fair and reasonable wear and usage thereof, only excepted," the lessor having first put the premises into good and tenantable repair, pursuant to his covenant thereinafter mentioned; and wherein Richard Hall covenanted for himself, his heirs, &c., forthwith to put the whole of the premises into repair, and during the term to keep in repair the excepted portions. It then goes on to allege that John Hall, the defendant's testator, became assignee of the reversion, and assigns for breaches,—first, that Richard Hall in his life-time, and John Hall after he became assignee, did not put the premises in repair,—secondly, that John Hall, whilst such assignee, did not keep the excepted parts of the premises, or the steam-engines, &c., in repair. The fifth plea (to the first breach) alleges that John Hall became assignee of the reversion by reason of the death of Richard Hall; that, in the life-time of Richard Hall, and before John Hall became such assignee, a reasonable time had elapsed, and all things had happened to entitle the lessee to have the covenant to put the premises into repair performed by the lessor; and that the covenant was wholly broken before John Hall became such assignee. That plea raises the question whether

the assignee of the reversion is liable where there has been a breach of such a covenant in the time of the lessor. The breach is continuing so long as the premises remain unrepaired; and for this the assignee is responsible. The sixth repeats the allegations contained in the fifth plea, and further alleges that, after the death of the lessor, the lessee sued the executors of the lessor (the defendant's testator being one of them), for, amongst other things, the same breach of covenant, that is, for not putting the premises in repair, and also for not keeping the excepted portions in repair, and recovered damages for both. This raises the further question, what is the proper measure of damages in such a case. The seventh plea states a recovery of damages in an action against John Hall for not having kept the main walls, &c., and the steam-engines, &c., in repair. The eighth plea, which incorporates the allegations in the seventh plea, states that the want of repair complained of was the continuance only of the want of repair in respect of which damages had been awarded against John Hall in the former action. That clearly is no answer to a continuing breach. The ninth plea repeats the sixth and seventh pleas, and in substance alleges that Gorton did not expend the money recovered in putting the premises into repair; and that, if he had done so, the want of repair complained of in the second breach would not have occurred. This again raises the question as to what is the true measure of damages in a case of this kind. In Mayne on Damages, p. 133, the rule is thus stated: "When the tenant covenants to keep in repair, an action may be brought for breach of covenant at any time during the continuance of the lease: *Luxmore* v. *Robson* (1); and Lord Holt ruled that, in such a case, the measure of damages was the amount it would cost to put the premises into repair: *Vivian* v. *Champion*. (2) This view, however, has been departed from in later cases, and it has been ruled that the measure of damages is the extent to which the marketable value of the reversion is injured. This would be very great if the lease were near its expiration; very small if it had a long time to run: *Doe* d. *Worcester* v. *Rowlands* (3); *Smith* v. *Peat*. (4) A recent

(1) 1 B. & A. 584.
(2) 2 Ld. Raym. 1125; 1 Salk. 141.
(3) 9 C. & P. 734.
(4) 9 Exch. 161; 23 L. J. (Ex.) 84.

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case,—*Marriott* v. *Cotton* (1),—seems opposed to this rule. The action was upon a contract to repair. Plea, that the premises were in good repair until they were accidentally burnt down; and verdict for the defendant upon this plea. Damages were to be assessed contingently, in case the plea should be held bad; and Rolfe, B., directed nominal damages. He said that otherwise, as the action was brought during the tenancy, the plaintiff might put the money into his pocket, and then bring another action for non-repair, in which, on the principle contended for by the plaintiff, he would be entitled again to recover substantial damages. The plaintiff, he thought, could at most recover damages on account of the premises continuing out of repair up to the commencement of the action, and he did not see how these damages could be other than nominal. It is clear, however, that this decision must have rested upon the circumstances of the particular case. As the source of the injury was found to be accidental, no damages could of course be given for allowing the premises to get out of repair. The only ground of action was for not putting them into repair. This would be measured by the extent to which the reversion was injured by such neglect at the time of action. No actual damage was proved; and, as the premises were insured, and the whole thing was mere accident, the jury, no doubt, were of opinion that the reversion was not in fact damaged substantially by any wrong *committed by the defendant*. Nominal damages in such a case were quite just. To lay down, however, as a general rule, that damages must necessarily be nominal for leaving a house in ruins during the currency of the term, would clearly be absurd, and could never have been intended. The value of the reversion would be essentially injured. Nor would the objection of the learned Baron apply to damages given on this account. The plaintiff might, no doubt, put the money into his pocket, and commence a fresh action next day; but he could not recover substantial damages in such an action, unless he could prove some additional injury to his reversion, subsequent to that for which he had been already recompensed. The lessee clearly was not bound to expend the whole amount of damages recovered in the former action in putting the premises in repair. A portion of those

(1) 2 C. & K. 553.

damages might have been given for the inconvenience and loss which he sustained from the non-performance of the lessor's covenant: and, further, between the time of commencing that action and the recovery of judgment some damage must have accrued to the lessee which was not covered by the award. The tenth plea, which is also pleaded to the second breach, alleges that the breach was occasioned by the default of Gorton, the lessee, in not keeping the premises in repair (the main walls and the machinery excepted), according to his covenant. The question raised by the replication to that plea is, whether the performance by the lessor of his covenant to *put* the premises in repair, was not a condition precedent. As to this *Neale* v. *Ratcliff* (1) is a distinct authority. There, the plaintiff agreed to let and the defendants to take a messuage, &c., and the defendants agreed to keep in repair the said messuage, &c., *the same being first put into repair by the plaintiff:* and it was held that the repair by the plaintiff was a condition precedent to the obligation on the defendants to keep in repair. The eleventh plea (to the second breach) alleges that the want of repair complained of was not occasioned by fair and reasonable wear and usage. The clause as to fair and reasonable wear and usage is not applicable to the main walls, roofs, slates, and principal timbers of the buildings, but only to the steam-engines, &c. This clearly is so in the exception to the lessee's covenant; and the same words must receive the same construction in the lessor's covenant. That plea, therefore, is no answer to the second breach. The twelfth plea, to both breaches, states that John Hall had no notice of the want of repair. That plea seems to be founded on a dictum of Mansfield, C.J., and Gibbs, J., in *Moore* v. *Clark* (2), which is to this effect,—"The lessor may charge the lessee without notice; for, the lessor is not on the spot to see the repairs wanting: the lessee is, and therefore the lessee cannot charge the lessor for breach of repairs without notice, for the lessor may not know that repairs are necessary." All the authorities, however, shew that notice to the lessor, or to the assignee of the reversion, was not necessary: *Henning's Case* (3); Com. Dig. Condition (L. 9); *Vyse* v. *Wakefield.* (4)

(1) 15 Q. B. 916; 20 L. J. (Q.B.) 130.

(2) 5 Taunt. 90, 96.

(3) Cro. Jac. 432; cited in Vin. Abr. Condition (A. d.) pl. 15, as *Haule* v. *Hemyng.*

(4) 6 M. & W. 442; in error, 7 M. & W. 126.

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[*Mellish, Q.C.*, contrà, admitted that the plea was bad as to the first breach; but said he should have been prepared to contend that it was good as to the second. As, however, the fact was against him, he consented to the twelfth plea being struck out.]

The fifteenth plea is clearly bad.

[WILLES, J. You cannot plead error to debt on a judgment.]

Then, as to the sixteenth plea,—the action by Gorton against John Hall, referred to in the second count, was founded upon certain provisions in the lease which are not now before the Court. Certain things were to be valued at the end of the term, and the difference of value, with an allowance for wear and tear, was to be ascertained by a reference to arbitrators, and paid by the one party to the other accordingly. In that action Gorton obtained a verdict for 1142*l.* 2*s.* 11*d.* John Hall died, but within two terms after his death judgment was entered against him de bonis propriis. Error was brought upon that judgment, because the covenant referred to chattels as well as to fixtures, and those went to the executors. The court of error rectified the blunder, and made it a judgment, as to the damages, de bonis testatoris. The objection to the count is, that John Hall died before that judgment was obtained.

[WILLES, J. There was a wrong judgment entered at the proper time, which was afterwards amended in due course of law. What objection can there be to that?

Mellish, Q.C. The judgment of the Exchequer Chamber is not now in question. The defendants rely upon the sixteenth plea as being an argumentative denial of the devastavit alleged in the count.]

The second count charges a devastavit by John Hall; and, though at common law his executor or administrator would not have been responsible for that, yet it is clear that since the statute 30 Car. 2, c. 7 (1), made perpetual by 4 & 5 W. & M. c. 24, s. 12, he is: see notes to *Wheatley* v. *Lane* (2); 2 Williams on Executors, 6th ed. 1597, where the whole of the law upon the subject is to be found.

Mellish, Q.C. (*Quain* and *R. G. Williams* with him), contrà. The first question is, whether the covenant by the lessor forthwith to

(1) Sometimes cited as 30 Car. 2, stat. 1, c. 7. (2) 1 Wms. Saund. 219*d*, 219*e*.

put the premises into repair having once been broken, there can be any further breach of it. It could hardly be contended that, the covenant being once performed, the lessor could be called upon to perform it again. The fifth and sixth pleas, therefore, which shew that that covenant had been broken before the testator of the present defendant became assignee, afford a good answer as to that. The seventh and eighth pleas raise the question as to what is the proper measure of damages in such a case. It must be either the sum it would cost to put the premises into repair, or the damage which the lessee would sustain during the whole of the term by reason of their not having been put into repair pursuant to the covenant. He clearly could only bring one action, and must recover damages for the whole of the term. It seems to be doubtful whether in such an action the damages would not be limited to the cost of repairing; but, at the most, the lessee could only recover the cost of repairing and a compensation for any inconvenience which he might sustain whilst the premises were out of repair. Here, the lessee has obtained damages for the breach of covenant, and has put the money into his pocket, and has done nothing. It would be unjust to hold that the lessor or his representative is to be subject again to a claim for substantial damages, as if no former action had been brought.

[BYLES, J. Is the lessee to have no compensation for the continuing damage?]

If there is continuing damage, it is the lessee's own fault. In an *Anonymous Case* in Leonard (1), the facts were these:—"A man made a lease for years, and the lessee covenanted to make reparations. The lessor granted the reversion to another, and the lessee for years made his wife his executrix, and died. It was holden by the Court that the grantee of the reversion should not recover damages but from the time of the grant, and not for any time before; but yet the wife, the executrix, should be charged for the not reparations as well in the time of her husband as in her own time: and if she do make the reparations depending the suit, yet thereby the suit shall not abate, but it shall be a good cause to qualify the damages, according to that which may be supposed that the party is damnified for the not repairing from the time of

(1) 3 Leon. 51.

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the purchase of the reversion unto the time of the bringing of the action." And it was said by Manwood, J., "that, by the recovery of the damages, the lessee should be excused for ever after for making of reparations: so as if he suffer the houses for want of reparations to decay, that no action shall thereupon after be brought for the same; but that the covenant is extinct."

[WILLES, J. That is contrary to the modern authorities.]

The ninth, which is an equitable plea, alleges a recovery by the lessee of damages both for not putting the premises into repair (which, it is submitted, is for the whole of the time,) and for not repairing the main walls, &c., and further alleges that the lessee did not expend the money in repairing, and that, if he had done so, the want of repairs now complained of would not have occurred. Where damages have been recovered for the breach of a covenant of this sort, the payment of the damages ought to place the party in the same position, in equity at least, if not in law, as if he had performed his covenant.

[WILLES, J., referred to *Simpson* v. *Scottish Union Fire and Life Insurance Company* (1), and to *Vernon* v. *Smith* (2), as to the effect of the covenant to insure, and the obligation to expend the money recovered in repairing or rebuilding the premises.]

As to the eleventh plea, the covenant to be construed is the covenant of the lessor. If that is to be construed with reference to the previous covenant of the tenant, regard being had to the nature of the premises, the reasonable construction of both would seem to be to apply the exception to the whole subject-matter of the demise, and not to limit it to the steam-engines and machinery.

[BYLES, J. The word "usage" is more applicable to machinery than to buildings.]

As to the sixteenth plea, it must be conceded that an executor or administrator is liable for a devastavit by his testator or intestate, though at common law he was not so. But an executor who has money enough in his hands to satisfy the debts of his testator is not guilty of a devastavit: and here it is averred that John Hall at the time of his death had assets of Richard Hall in his hands

(1) 32 L. J. (Ch.) 329: (2) 5 B. & A. 1.

sufficient to satisfy the judgment, and that his co-executor, in whom they would vest at his death, is still living.

[WILLES, J. In the notes to *Wheatley* v. *Lane* (1), it is put on the ground that it is the personal act of the executor: "Whatever act of the executor would have made him personally liable and chargeable with the payment of the demand de bonis propriis, will now, by virtue of these statutes (2), make his *personal estate* liable in the hands of his executor or administrator." The plea admits a devastavit.]

If he has wasted other goods, but has still sufficient to satisfy the judgment, there is no devastavit.

[WILLES, J. The words of the statute are, "*any* goods, chattels, estate, or assets," of the testator. The point is too clear for argument.

BYLES, J. The sixteenth plea does not allege that the defendant never had any assets of John Hall.]

No. Perhaps it should have gone on to aver, that, except as aforesaid, there was no devastavit.

The Court intimating that they were prepared to give judgment for the plaintiffs as to all except the fifth and sixth pleas, and *Kemplay* admitting that he could not contend that there was more than one breach of the covenant to put the premises into repair, he was not heard in reply.

ERLE, C.J. The first count of the declaration is for breaches of a covenant contained in a lease, whereby Richard Hall, the lessor, engaged to put the whole of the demised premises into repair, and to keep in repair certain portions thereof; and it alleges that John Hall, the defendant's testator, who, it appears, was executor, as well as assignee of the reversion, of Richard Hall, was guilty of two breaches,—first, in not putting the whole of the premises into repair,—secondly, in not keeping in repair the portions mentioned in the covenant in that behalf. As to the first breach, it appears to me that that part of the covenant could only be broken once, and that, when damages were once reco-

(1) 1 Wms. Saund. 219*d*. See also 2 Williams on Executors, 6th ed. 1597.

(2) 30 Car. 2, c. 7, and 4 & 5 W. & M. c. 24, s. 12.

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vered in respect of that breach, no more could be recovered: and therefore, as it is clear that the covenant to put the premises into repair was broken in the time of the lessor, and that that was a breach for which the assignee could not be liable, I am of opinion that our judgment ought to be for the defendant on the demurrers to the fifth and sixth pleas. As to the eighth and ninth pleas, to the second breach, for not keeping in repair, that is clearly a continuing breach, as to which those pleas afford no answer. The ninth plea, as to which I have felt the greatest difficulty, alleges that if Gorton had expended the moneys awarded and paid to him in putting the premises in repair, the want of repair which was the subject of complaint in the second breach would not have occurred, I am of opinion that that does not amount to a bar to the action. There is no precedent for such a plea as a defence on equitable grounds: and I can conceive many cases where it would be far from equitable to allow it to be a bar. All that it alleges is matter which may go in mitigation of damages. As to the eleventh plea, I give judgment for the plaintiffs upon the construction of the covenant. The covenant by Richard Hall is that he will "keep and maintain the whole of the main walls, roofs, slates, and principal timbers of the said several buildings and premises, and the steam-engines, boilers, water-wheels, and first motion therefrom, by the fair and reasonable wear and usage thereof, in good and tenantable order, repair, and condition." The breach alleged is, that John Hall, whilst he was assignee, and during the term, suffered and permitted the main walls, slates, and principal timbers of the said buildings and premises, and also the said steam-engines, boilers, water-wheels, and first motion therefrom, by the fair and reasonable wear and usage thereof, to be and continue out of repair, &c. And the plea is, that such want of repair, &c., were not occasioned by fair and reasonable wear and usage. The clause as to fair and reasonable wear and usage seems to me to be confined to the steam-engines, boilers, water-wheels, and first motion therefrom, and does not in my judgment extend to the main walls, slates, and principal timbers of the premises. On the sixteenth plea the plaintiffs must also have judgment. A devastavit by John Hall is charged in the second count and admitted by the plea: the defendant is therefore

responsible, notwithstanding John Hall or his co-executor may have retained assets of their testator sufficient to satisfy the judgment.

WILLES, J. I am of the same opinion. As to the fifth and sixth pleas to the first breach in the first count, for not putting the premises in repair, each of those pleas alleges that a reasonable time for putting the premises in repair elapsed in the time of Richard Hall. It abundantly appears, therefore, without referring to the latter part of the sixth plea, that the covenant was completely broken in the time of Richard Hall. That part of the covenant could only be broken once for all: and consequently there could be no breach of it in the time of the assignee. The seventh plea evidently was pleaded only for the purpose of introducing the statement at the end of it to help out the eighth and ninth pleas. The eighth and ninth pleas, which are pleaded to the second breach assigned in the first count, profess to set up a defence founded on the recovery by the tenant against John Hall, mentioned in the sixth plea. These pleas no doubt raise a question of considerable nicety and importance in the determination of disputes between landlords and tenants. It is very much the sort of question which it is felt so difficult to deal with that it is usually referred to some one to say what should be done. Those who have to decide what the proper measure of damages should be are obliged to form the best judgment they can with very little light to guide them. The difficulty presented in the present case is this: It is said that the tenant was entitled to recover all the damages at once, and therefore that the award must be taken to include such a sum as would put the tenant in the same position as if the landlord had repaired in proper time, and any damages he may have sustained by reason of the repairs not having been done at the time covenanted for. And it is said that here we are free from all difficulty, because we have a sum which represents, or must be taken to represent, all that the tenant is entitled to in order to put the premises in repair if he wishes to do so; and it is reasonable that the landlord should be in the same position as if he had laid it out in the first instance. There is a great appearance of logical reasoning in Mr. Mellish's argument; but, when you come to apply it in practice, the reasoning fails, because the

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verdict of a jury, though founded on evidence, is necessarily prophetical. All that the jury can say is, that the sum which they give is the sum which they believe will indemnify the plaintiff for the breach of covenant. Suppose they are wrong, what is the consequence? That the judgment must be taken to be final and conclusive? It would be absurd to say that the verdict necessarily represents a sum which would under all circumstances be sufficient to indemnify the plaintiff. Suppose the market-value of labour and materials should have risen in the meantime, ought the first verdict to conclude the tenant? I think it would be inequitable to come to any such conclusion. Nor do I think the verdict is to be rejected: it is primâ facie evidence that the tenant has received compensation pro tanto. Upon the whole, I think the proper result is that which my Lord has laid down, that the verdict is to be taken in mitigation of damages, but not as a final bar to an action for a breach of the covenant. Then comes the tenth plea which states that the landlord's failure to perform his covenant was caused by the default of the tenant in not maintaining and keeping the premises (the excepted parts excluded) in repair according to his covenant. Now, the tenant's covenant was, to keep the premises in repair, the landlord having first put them into complete repair and condition: and the replication to that plea is that the premises never were put into good and tenantable repair pursuant to the lessor's covenant. The case referred to by Mr. Kemplay, of *Neale* v. *Ratcliff* (1), seems to be an authority for the plaintiffs. It has had the effect of removing a doubt from my mind whether this was more than ground for a cross-action; for, it goes the whole length of deciding that, until the lessor has fulfilled his covenant to put the premises in repair, no liability to repair is cast upon the tenant by his covenant. The condition so imposed is not to be displaced. The eleventh plea, for the reason stated by my Lord, clearly cannot be sustained. And the twelfth plea has been struck out. This concludes the tale of the pleas to the first count.

We now come to the second count. Mr. Mellish did not attempt to support the demurrer to that count. It would be strange indeed to say that the defendant could be heard to allege that the judgment of a court of error was a bad judg-

(1) 15 Q. B. 916; 20 L. J. (Q.B.) 130.

ment. No attempt has been made to sustain the fifteenth plea. The sixteenth plea is equally unsustainable. The second count states that a judgment was obtained against John Hall, as executor, for a breach of covenant committed by his testator Richard Hall, and that John Hall was guilty of a devastavit. The defendant,—admitting the devastavit,—merely pleads that Richard Hall by his will appointed John Hall and one Ramsbottom his executors; that they duly proved the will; that Ramsbottom was at the time of the death of John Hall, and still is, living; that John Hall, at the time of his death, had in his hands, and upon and after his death Ramsbottom had in his hands, personal estate and effects of Richard Hall sufficient to satisfy the judgment; and that the defendant never had, nor has he, any personal estate and effects of Richard Hall in his hands as executor to be administered. The plea, however, omits to say that the defendant has no assets of his immediate testator. It therefore raises the question whether an executor who had been guilty of a devastavit, but who still had assets of his testator sufficient to satisfy the debt sued for, is within the 30 Car. 2, c. 7. That question is answered by the use of the words "any goods" in the statute. And this view is adopted in Williams on Executors, 6th ed. 1846, where it is said that, since the statutes, "in every case where the executor in his life-time was in any way guilty of any act which amounts in law to a devastavit, such as, exhausting the assets by payment of debts of an inferior degree before those of a superior, and the like, an action may be brought against the executor or administrator of such executor, suggesting a devastavit by the former executor." The result will be that the judgment of the Court is for the defendant upon the demurrers to the fifth and sixth pleas, and for the plaintiffs as to all the other issues in law.

BYLES, J. I am of the same opinion. My Lord and my Brother Willes have gone so fully into the reasons, that I will content myself with a single remark on the eighth and ninth pleas. The eighth plea is pleaded as to a continuing breach, or rather repeated breaches of the same covenant, and is bad on the face of it. As to the ninth plea I must confess I have felt a little difficulty. It is not, however, pretended to be a good plea at law: and I should

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have expected some precedent to be shewn for such a plea in equity. None has been cited.

KEATING, J. I am of the same opinion. I felt much pressed by the argument of Mr. Mellish on the ninth plea. But, for the reasons given by my Lord and my Brother Willes, I am satisfied that the argument is answered.

Judgment for the defendant on the fifth and sixth pleas; for the plaintiffs as to the rest.

Attorney for plaintiffs: *W. Hunt, for Hulton, Sadler, & Lister, Salford.*

Attorneys for defendant: *Stuart & Massey, for J. H. Bullock, Manchester.*

Nov. 14.

KELNER *v.* BAXTER AND OTHERS.

Principal and Agent—Contract by one professing to contract as Agent, but who has no existing Principal—Oral Evidence to contradict—Ratification—Appeal under s. 37 *of the Common Law Procedure Act,* 1854 (17 & 18 *Vict. c.* 125)*—Enlarging Time for giving Notice.*

Where a contract is signed by one who professes to be signing "as agent," but who has no principal existing at the time, and the contract would be wholly inoperative unless binding upon the person who signed it, he is personally liable on it: and a stranger cannot by a subsequent ratification relieve him from that liability.

A company being projected for carrying on the business of an hotel, and purchasing the premises and stock of the plaintiff, the following agreement was entered into,—"Jan. 27, 1866. To A., B., and C., on behalf of the proposed Gravesend Royal Alexandra Hotel Company. I hereby propose to sell the extra stock, as per schedule hereto, for the sum of 900*l.*, payable on the 28th of February, 1866" (signed by the plaintiff). "We have received your offer to sell the extra stock as above, and we hereby agree to accept the terms proposed." (Signed) "A., B., and C., on behalf of the Gravesend Royal Alexandra Hotel Company." The goods were handed over to the representatives of the proposed company, and were consumed in the business. The company obtained a certificate of incorporation under the Companies Act, 1862, on the 20th of February, but collapsed before the money was paid:—

Held, that A., B., and C. were personally liable on their agreement, as for goods sold and delivered; that no subsequent ratification by the company could relieve them from that liability without the assent of the plaintiff; and that parol evidence was not admissible to shew that personal liability was not intended.

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Where a party has through inadvertence allowed the time for giving notice of appeal under the 37th section of the Common Law Procedure Act, 1854, to elapse, the Court may in its discretion allow an appeal, but will be guided in the exercise of that discretion by the particular circumstances of each case.

THE declaration was for goods sold and delivered, goods bargained and sold, interest, and upon accounts stated.

The defendants pleaded,—first, never indebted,—secondly, payment,—thirdly, as to the claim for goods sold and delivered, and goods bargained and sold, that, by agreement in that behalf made by and between the plaintiff and the defendants on behalf of a joint stock company then proposed to be formed under the Joint Stock Companies Act, 1862, and to be called The Gravesend Royal Alexandra Hotel Company, Limited, the goods were sold to and bought and received by the defendants upon the terms that if the company, when registered, should adopt the said contract, and agree with the plaintiff to pay the agreed price of the said goods, the goods should become the property of the company, and the defendants should be exonerated and discharged from all further liability in respect thereof, and that such agreement of the company should be accepted by the plaintiff in full satisfaction and discharge of all such liability; that the company was registered by the name of The Gravesend Alexandra Hotel Company, Limited, and, when so registered, by agreement in that behalf made with the plaintiff, adopted the first-mentioned contract; and thereupon, and by and with the consent of the defendants, the goods became the property of the company, and the plaintiff and the company eventually agreed with each other to be bound by the first-mentioned contract, and the company agreed with the plaintiff to pay to the plaintiff the agreed price of the goods, and the plaintiff then before the action accepted the agreement so made with the company in full satisfaction and discharge of the claims therein pleaded to.

Fourth plea, to the claim for goods sold and delivered, and goods bargained and sold, that, by agreement in that behalf made by and between the plaintiff and the defendants on behalf of a joint stock company then proposed to be formed under the Joint Stock Companies Act, 1862, and to be called The Gravesend Royal Alexandra Hotel Company, Limited, the said goods were sold to

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and bought and received by the defendants on behalf of the said intended company; that the said company was formed and registered under the said act by the name of The Gravesend Hotel Company, Limited; and that afterwards and before this suit, by agreement in that behalf made by and between the plaintiff, the defendants, and the said company, the goods were transferred to and became the property of the company, and the company agreed with the plaintiff to pay the price thereof, and the plaintiff accepted and received such agreement on the part of the company in full satisfaction and discharge of the claims therein pleaded to. Issue thereon.

At the trial before Erle, C.J., at the sittings in London after last Trinity Term, the following facts appeared in evidence:—The plaintiff was a wine merchant, and the proprietor of the Assembly Rooms at Gravesend. In August, 1865, it was proposed that a company should be formed for establishing a joint-stock hotel company at Gravesend, to be called The Gravesend Royal Alexandra Hotel Company, Limited, of which the following gentlemen were to be the directors, viz. Mr. L. Calisher, Mr. T. H. Edmands, Mr. M. Davis, Mr. Macdonald, Mr. Hulse, Mr. N. J. Calisher (one of the defendants), and the plaintiff. The plaintiff was to be the manager of the proposed company, and Mr. Dales (another of the defendants) was to be the permanent architect. One part of the scheme was that the company should purchase the premises of the plaintiff for a sum of 5000*l.*, of which 3000*l.* was to be paid in cash, and 2000*l.* in paid up shares, the stock, &c., to be taken at a valuation; and this was carried into effect and completed, the other defendant (Baxter) being the nominal purchaser on behalf of the company. In December a prospectus was settled. On the 9th of January, 1866, a memorandum of association was executed by the plaintiff and the defendants and others.

Pending the negotiations the business had been carried on by the plaintiff, and for that purpose additional stock had been purchased by him; and on the 27th of January, 1866, an agreement was entered into for the transfer of this additional stock to the company, in the following terms:—

"January 27th, 1866.

"To John Dacier Baxter, Nathan Jacob Calisher, and John Dales, on behalf of the proposed Gravesend Royal Alexandra Hotel Company, Limited.

"Gentlemen,—I hereby propose to sell the extra stock now at the Assembly Rooms, Gravesend, as per schedule hereto, for the sum of 900*l.*, payable on the 28th of February, 1866.

(Signed) "John Kelner."

Then followed a schedule of the stock of wines, &c., to be purchased, and at the end was written as follows:—

"To Mr. John Kelner.

"Sir,—We have received your offer to sell the extra stock as above, and hereby agree to and accept the terms proposed.

(Signed) "J. D. Baxter,
"N. J. Calisher,
"J. Dales,
"On behalf of the Gravesend Royal Alexandra Hotel Company, Limited."

In pursuance of this agreement the goods in question were handed over to the company, and consumed by them in the business of the hotel; and on the 1st of February a meeting of the directors took place, at which the following resolution was passed: "That the arrangement entered into by Messrs. Calisher, Dales, and Baxter, on behalf of the company, for the purchase of the additional stock on the premises, as per list taken by Mr. Bright, the secretary, and pointed out by Mr. Kelner, amounting to 900*l.*, be, and the same is hereby ratified." There was also a subsequent ratification *by the company*, viz. on the 11th of April, but this was after the commencement of the action.

The articles of association of the company were duly stamped on the 13th of February, and on the 20th the company obtained a certificate of incorporation under the 25 & 26 Vict. c. 89.

The company having collapsed, the present action was brought against the defendants upon the agreement of the 27th of January.

On the part of the defendants oral evidence was tendered for the purpose of shewing that it never was intended that they should be personally liable; but his Lordship rejected it. It was then sub-

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mitted that, inasmuch as the agreement was not entered into by the defendants personally, but only as agents for the hotel company, they thereby incurred no personal obligation to the plaintiff, who was himself one of the promoters.

For the plaintiff it was insisted that, there being no company in existence at the time of the agreement, the parties thereto had rendered themselves personally liable; and that there could be no ratification of the contract by a subsequently created company.

A verdict was taken for the plaintiff for 900*l.*, subject to leave reserved to the defendants (upon giving security) to move to enter a nonsuit, on the ground that the agreement of the 27th of January did not make them personally liable.

Nov. 6, 1866. *Seymour, Q.C.*, obtained a rule nisi accordingly, and also for a new trial on the ground of misdirection on the part of the learned judge, "in not allowing witnesses to be called to contradict the plaintiff as to the defendants' personal liability."

Nov. 13, 14. *J. Brown, Q.C.*, and *Thesiger*, shewed cause. The ruling of the learned judge was clearly right. The agreement of the 27th of January, 1866, must receive the same construction as it would have received the day after it was entered into. The company was not then formed. Suppose it never was formed at all, could it for a moment have been contended that the defendants were not personally liable? The obvious intention of the parties was that the company when formed should have the benefit of the contract; but that, if the company failed to come into existence by that time, the plaintiff should at all events be paid on the 28th of February. The agreement would be a mere nullity unless it be construed as the personal undertaking of those who signed it. There is therefore strong reason for so construing it ut res magis valeat quam pereat. Although evidence may be given of the surrounding circumstances which existed at the time a contract was entered into, no evidence can be received to contradict a written agreement. In *Higgins* v. *Senior* (1), it was held that it was not competent to the defendant in an action on an agreement in writing purporting on the face of it to be made by him, and signed by him, to shew that the agree-

(1) 8 M. & W. 834.

ment was really made by him by the authority of and as agent for a third person, and that the plaintiff knew those facts at the time when the agreement was made and signed. In *Furnivall* v. *Coombes* (1), a proviso to exclude personal responsibility of the contracting parties was held to be repugnant and void, the parishioners, for whom they professed to be contracting, not being chargeable as such. Upon the same principle it was held in *Doubleday* v. *Muskett* (2), where the defendants had agreed to become directors of a voluntary projected water company for which an act of parliament was to be obtained, and, though no act was obtained, the directors had published an advertisement for proposals for excavating and removing the earth and chalk for reservoirs, and the proposals of the plaintiff had been accepted, and the plaintiff had performed the labour and services upon a reservoir accordingly, and the scheme afterwards proved abortive,—that the defendants were personally liable.

[WILLES, J. Does the ratification of the contract by the company after their formation transfer the obligation to them?]

There can be no ratification by a person or a corporation not existing at the time the contract was entered into. And, even if there could, the ratification by the company was after the commencement of the action. If the company adopted it, it could only be by way of a new agreement; for, they could not be bound by a contract made by the promoters before the company was registered: *Hutchison* v. *Surrey Consumers Gas-Light Association* (3); *Payne* v. *New South Wales Coal and Intercolonial Steam Navigation Company.* (4)

[WILLES, J. *Gunn* v. *London and Lancashire Fire Insurance Company* (5) seems to be quite in point to shew that the company could not have been made liable upon this contract, even though they affected to ratify it.

BYLES, J. If the company, when formed, had taken to the wines and spirits in question, and had allowed them to be consumed by their customers, might they not have been liable as for goods sold and delivered?]

(1) 5 M. & G. 736; 6 Scott N. R. 522.
(2) 7 Bing. 110.
(3) 11 C. B. 689; 21 L. J. (C.P.) 1.
(4) 10 Ex. 283; 24 L. J. (Ex.) 117.
(5) 12 C. B. (N.S.) 694.

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Doubtless they might. There are numerous cases where the defendant has been held liable as the acceptor of a bill of exchange, though he has professed to accept "per procuration," or on account or on behalf of a company: amongst others are the cases of *Nicholls* v. *Diamond* (1), and *Owen* v. *Van Uster* (2): and that rule is recognised in *Penrose* v. *Martyr* (3), where, however, the decision turned mainly upon the 31st section of the Joint Stock Companies Act, 1856 (19 & 20 Vict. c. 47). Every intendment must be made against the person who signs the contract, where there is no responsible principal at the time to whom recourse can be had: Story on Agency, ss. 280—282. In *Lewis* v. *Nicholson* (4), Lord Campbell, referring to *Hall* v. *Ashurst* (5), where the undertaking was "on behalf of the London creditors," and to *Watson* v. *Murrell* (6), where it was "on behalf of the parish," says: "It could not reasonably be intended that the plaintiff should contract with such bodies; and therefore it was apparent on the face of the instrument that the contract must be intended to be personal."

[BYLES, J. The only difficulty I feel is, that the words "on behalf of the proposed Gravesend Royal Alexandra Hotel Company, Limited," are the words of the plaintiff, which are adopted by the defendants.]

In *Ex parte Hartop* (7), Lord Erskine, C., says: "No rule of law is better ascertained, or stands upon a stronger foundation than this, that, where an agent names his principal, the principal is responsible, not the agent; but, for the application of that rule, the agent must name his principal *as the person to be responsible.*" The mere fact of a person professing to sign a contract for or on behalf or as agent for another will not per se prevent responsibility as a contracting party attaching upon the former. This is sufficiently exemplified by the cases of *Tanner* v. *Christian* (8) and *Lennard* v. *Robinson.* (9) No evidence which could have been received was rejected; and none was admissible to contradict the

(1) 9 Ex. 154; 23 L. J. (Ex.) 1.
(2) 10 C. B. 318; 20 L. J. (C.P.) 61.
(3) E. B. & E. 499; 28 L. J. (Q.B.) 28. 5 Jur. N.S. 362.
(4) 18 Q. B. 503, 510; 21 L. J. (Q.B) 311.
(5) 1 C. & M. 714.
(6) 1 C. & P. 307.
(7) 12 Ves. 349, 352.
(8) 4 E. & B. 591; 24 L. J. (Q.B.) 91. 1 Jur. N.S. 1
(9) 5 E. & B. 125; 24 L. J. (Q.B.) 275. 1 Jur. N.S. 854

written agreement, or to explain that which was on the face of it free from ambiguity.

Seymour, Q.C., in support of the rule. The surrounding circumstances shewed an evident intention to exclude personal liability in those who signed the agreement. The arrangement had reference exclusively to the formation of a company in which the plaintiff himself had a deep interest. The day for payment was inserted because all parties were satisfied that the business of the company would then have commenced.

[WILLES, J. There can be no doubt that all parties contemplated that the goods would be paid for out of the funds of the company. In *Lindus* v. *Melrose* (1), the following promissory note was signed by three persons describing themselves as "directors" of a joint stock company incorporated, with limited liability, under the 19 & 20 Vict. c. 47, and was countersigned by one Guess, who described himself as "secretary" of the company:—"London, Dec. 31, 1856. Three months after date we jointly promise to pay Mr. F. Shaw or order six hundred pounds for value received in stock on account of the London and Birmingham Iron and Hardware Company, Limited;" and it was held by a majority of judges in the Exchequer Chamber, affirming the judgment of the Court of Exchequer (2), that the directors who signed the note were not personally liable. The difficulty in the present case is that there was no company formed.]

The agreement was made on behalf of the company, which was known to be in the course of formation; and the company ratified it when formed. In *Aggs* v. *Nicholson* (3), a note signed by two directors of a completely registered joint stock company, expressed to be made "by and on behalf of the company," was held to be binding on the company, and not on the persons who signed it. And Bramwell, B., refers to an American case of *Bradlee* v. *Boston Glass Manufactory* (4), where the Court considered that if the words "for the Boston Glass Manufactory" had stood alone the note would have bound the company. There was abundant evidence here that the defendants had the authority they professed to

(1) 3 H. & N. 177; 27 L. J. (Ex.) 326, 328.

(2) 2 H. & N. 293; 27 L. J. (Ex.) 326.

(3) 1 H. & N. 165; 25 L. J. (Ex.) 348.

(4) 16 Pick. 347.

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have. Both parties to the agreement had equal knowledge of the circumstances; and the subsequent recognition of the authority was sufficient: per Holroyd, J., in *Saunderson* v. *Griffiths.* (1) And see the dictum of Alderson, B., in *Taylor* v. *Crowland Gas Company.* (2) If the defendants had no principals at the time of entering into the contract, or had no authority to contract for them, that ought to have been the subject of a special count: *Jenkins* v. *Hutchinson.* (3) The defendants were prepared with overwhelming evidence to shew that it was never the intention of the parties that those who did the mere formal act of signing the agreement should be personally liable.

[BYLES, J. No evidence could exclude personal liability in the defendants, if the written document itself makes them liable.]

The surrounding facts may always be looked at to shew the intention of the contracting parties.

ERLE, C.J. I am of opinion that this rule should be discharged. The action is for the price of goods sold and delivered: and the question is whether the goods were delivered to the defendants under a contract of sale. The alleged contract is in writing, and commences with a proposal addressed to the defendants, in these words:—"I hereby propose to sell the extra stock now at the Assembly Rooms, Gravesend, as per schedule hereto, for the sum of 900*l.*, payable on the 28th of February, 1866." Nothing can be more distinct than this as a vendor proposing to sell. It is signed by the plaintiff, and is followed by a schedule of the stock to be purchased. Then comes the other part of the agreement, signed by the defendants, in these words,—"Sir, We have received your offer to sell the extra stock as above, and hereby agree to and accept the terms proposed." If it had rested there, no one could doubt that there was a distinct proposal by the vendor to sell, accepted by the purchasers. A difficulty has arisen because the plaintiff has at the head of the paper addressed it to the plaintiffs, "on behalf of the proposed Gravesend Royal Alexandra Hotel Company, Limited," and the defendants have repeated those words after their signatures to the document; and the question is,

(1) 5 B. & C. 909, 914. (2) 10 Ex. 288, n. (3) 13 Q. B. 744; 18 L. J. (Q.B.) 274.

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whether this constitutes any ambiguity on the face of the agreement, or prevents the defendants from being bound by it. I agree that if the Gravesend Royal Alexandra Hotel Company had been an existing company at this time, the persons who signed the agreement would have signed as agents of the company. But, as there was no company in existence at the time, the agreement would be wholly inoperative unless it were held to be binding on the defendants personally. The cases referred to in the course of the argument fully bear out the proposition that, where a contract is signed by one who professes to be signing "as agent," but who has no principal existing at the time, and the contract would be altogether inoperative unless binding upon the person who signed it, he is bound thereby: and a stranger cannot by a subsequent ratification relieve him from that responsibility. When the company came afterwards into existence it was a totally new creature, having rights and obligations from that time, but no rights or obligations by reason of anything which might have been done before. It was once, indeed, thought that an inchoate liability might be incurred on behalf of a proposed company, which would become binding on it when subsequently formed: but that notion was manifestly contrary to the principles upon which the law of contract is founded. There must be two parties to a contract; and the rights and obligations which it creates cannot be transferred by one of them to a third person who was not in a condition to be bound by it at the time it was made. The history of this company makes this construction to my mind perfectly clear. It was no doubt the notion of all the parties that success was certain: but the plaintiff parted with his stock upon the faith of the defendants' engagement that the price agreed on should be paid on the day named. It cannot be supposed that he for a moment contemplated that the payment was to be contingent on the formation of the company by the 28th of February. The paper expresses in terms a contract to buy. And it is a cardinal rule that no oral evidence shall be admitted to shew an intention different from that which appears on the face of the writing. I come, therefore, to the conclusion that the defendants, having no principal who was bound originally, or who could become so by a subsequent ratification, were themselves bound, and that

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the oral evidence offered is not admissible to contradict the written contract.

WILLES, J. I am of the same opinion. Evidence was clearly inadmissible to shew that the parties contemplated that the liability on this contract should rest upon the company and not upon the persons contracting on behalf of the proposed company. The utmost it could amount to is, that both parties were satisfied at the time that all would go smoothly, and consequently that no liability would ensue to the defendants. The contract is, in substance, this,—"I, the plaintiff, agree to sell to you, the defendants, on behalf of the Gravesend Royal Alexandra Hotel Company, my stock of wines;" and, "We, the defendants, have received your offer, and agree to and accept the terms proposed; and you shall be paid on the 28th of February next." Who is to pay? The company, if it should be formed. But, if the company should not be formed, who is to pay? That is tested by the fact of the immediate delivery of the subject of sale. If payment was not made by the company, it must, if by anybody, be by the defendants. That brings one to consider whether the company could be legally liable. I apprehend the company could only become liable upon a new contract. It would require the assent of the plaintiff to discharge the defendants. Could the company become liable by a mere ratification? Clearly not. Ratification can only be by a person ascertained at the time of the act done,—by a person in existence either actually or in contemplation of law; as in the case of assignees of bankrupts and administrators, whose title, for the protection of the estate, vests by relation. The case of an executor requires no such ratification, inasmuch as he takes from the will. It is unnecessary, however, to pursue this further. In addition to the cases cited at the bar, I would refer to *Gunn* v. *London and Lancashire Fire Insurance Company* (1), where this Court, upon the authority of *Payne* v. *New South Wales Coal and International Steam Navigation Company* (2), held that a contract made between the projector and the directors of a joint-stock company provisionally registered, but not in terms made conditional on the completion of the company, was not binding upon

(1) 12 C. B. (N.S.) 694. (2) 10 Ex. 283; 24 L. J. (Ex.) 117.

the subsequent completely registered company, although ratified and confirmed by the deed of settlement: and Williams, J., said, that, "to make a contract valid, there must be parties existing at the time who are capable of contracting." That is an authority of extreme importance upon this point; and, if ever there could be a ratification, it was in that case. Both upon principle and upon authority, therefore, it seems to me that the company never could be liable upon this contract: and, as was put by my Lord, construing this document ut res magis valeat quam pereat, we must assume that the parties contemplated that the persons signing it would be personally liable. Putting in the words "on behalf of the Gravesend Royal Alexandra Hotel Company," would operate no more than if a person should contract for a quantity of corn "on behalf of my horses." As to the suggestion that there should have been a special count, that is quite a mistake. There need not be a special count unless there was a person existing at the time the contract was made who might have been principal. The common count perfectly well represents the character of the liability which these defendants incurred. It is quite out of the question to suppose that there was any mistake. The document represents the real transaction between the parties. I think that the course taken at the trial was perfectly correct, and that the rule should be discharged.

BYLES, J. I am of the same opinion. At first, I must confess, I entertained some doubt, the contract appearing on the face of it to have been entered into by the defendants on behalf of the company. The true rule, however, is that stated by Mr. Thesiger, viz. that persons who contract as agents are generally personally responsible where there is no other person who is responsible as principal. Suppose this company never came into existence at all, could it be doubted that these defendants must be held to have bound themselves personally? Then, was it contemplated that the liability was conditional only until the company should be formed? It is said that the contract was ratified by the company after it came into existence. There could, however, be no ratification. Omnis ratihabitio retrotrahitur, et mandato priori æquiparatur: but the ratification must be by an existing person, on whose behalf the con-

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tract might have been made at the time. That could not be so here: a subsequent ratification by the company could only be with the assent of the plaintiff; and then it would be a new contract. Mr. Seymour contended that the contract might amount to a personal undertaking on the part of the defendants that the company shall pay. That would make them equally liable. Any objection on the score of the Statute of Frauds would be cured by the Mercantile Law Amendment Act, 19 & 20 Vict. c. 97. In no way, therefore, in which it can be put, could the company become responsible.

KEATING, J. I am of the same opinion. At the time the contract was made there was no company in existence. It is true that the defendants profess to contract "on behalf of the Gravesend Royal Alexandra Hotel Company." But, notwithstanding the introduction of those words, the defendants must, in order to give the contract any operation at all, be personally responsible. The length to which the Courts have gone upon this subject is strongly illustrated by the case of *Furnivall* v. *Coombes*. (1) There, by indenture the plaintiff covenanted to do certain repairs to the parish church of St. Botolph, and the defendants, the churchwardens and overseers, "for themselves and for their successors, churchwardens and overseers of the parish," covenanted with the plaintiff to pay the sum agreed by certain instalments: and the indenture contained a proviso "that nothing in these presents contained should extend, or be deemed, adjudged, construed, or taken to extend to any personal covenant of or obligation upon the several persons parties thereto of the third part (the churchwardens, &c.), or in any way personally affect them, any or either of them, their or any or either of their executors, administrators, goods, effects, or estates, in their private capacity, but should be and was intended to be binding and obligatory upon the churchwardens and overseers of the poor of the said parish of St. Botolph and their successors for the time being, as such churchwardens, &c., but not further or otherwise:" and it was held that the original covenant was a *personal* covenant by the defendants to pay the money, and that the proviso was repugnant thereto and inconsistent therewith, and therefore void.

(1) 6 Scott, 522; 5 M. & G. 736.

BYLES, J., afterwards referred to *Meriel* v. *Wymondsold* (1), where "upon a bill in equity the case was thus, viz. The plaintiff had agreed with two of the defendants to pave their streets in Putney, and they *on behalf of the parish* agreed to pay him for them, which agreement was put into writing, and remains in the hands of the defendant Wymondsold. The work was done according to the agreement, and it came to 360*l.*, and for satisfaction the plaintiff preferred his bill against them with whom he had agreed and against others of the parish who had agreed with the undertakers for the parish to pay their shares. And, per Curiam: "The plaintiff must have relief against the undertakers, especially in this case, because the written agreement, which is his evidence, is in the hands of one of the defendants: and the undertakers must take their remedy against the rest of the parish." He also referred to *Cullen* v. *Duke of Queensbury* (2), where it was held in the Court of Chancery, and afterwards in the House of Lords (3), that, where A., B., and C., on behalf of themselves and other members of a club, enter into articles with D. to provide necessaries for the use and accommodation of the club, they are personally bound by such articles, and D. is not obliged to resort to any of the other members for satisfaction of his demand.

Rule discharged. (4)

Nov. 22. *Seymour, Q.C.*, moved to enlarge the time for giving notice of appeal, the defendants' attorneys having inadvertently omitted to give notice within the four days limited for that purpose by the 37th section of the Common Law Procedure Act, 1854, 17 & 18 Vict. c. 125. He submitted that the plaintiff could not be prejudiced, inasmuch as the time for perfecting bail had not elapsed. He referred to *Ward* v. *Lumley* (5), where a similar application had been granted by the Court of Exchequer.

[ERLE, C.J. That was a case full of doubts and difficulties. This was an ordinary action for goods sold and delivered. The jury had no doubt, and I had no doubt at the trial; and neither my learned Brethren nor myself entertained any when the rule was argued.]

(1) Hardr. 205.
(2) 1 Bro. C. C. 101.
(3) 1 Bro. P. C. 396.
(4) See *Scott* v. *Lord Ebury*, post, Hilary Term, 1867.
(5) 5 H. & N. at p. 659; 29 L. J. (Ex.) 372.

6 Jur. N.S. 560

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In *Ward* v. *Lumley*, it was put by the Court, not upon the merits of the case, but upon the right to appeal, which the defendants had lost by inadvertence.

PER CURIAM (Erle, C.J., Willes and Keating, JJ.)

Rule refused.

Attorneys for plaintiff: *Linklaters, Hackwood, & Addison.*
Attorneys for defendants: *Edmands & Mayhew.*

Nov. 16.

FOTHERBY *v.* METROPOLITAN RAILWAY COMPANY

Mandamus—Common Law Procedure Act, 1854 (17 & 18 *Vict. c.* 125), *s.* 68—*Compulsory taking of Land—Lands Clauses Consolidation Act* (8 & 9 *Vict. c.* 18), *s.* 39.

An action for a mandamus may lie even when no actual damage has been sustained.

The neglect by a railway company to issue a warrant to the sheriff to summon a jury to assess the value of land which they have given notice that they will require for the purposes of their act, within a reasonable time after such notice, is an actionable wrong, and the issue of such warrant may be enforced by an action for a mandamus under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 68.

DECLARATION, that the defendants were a railway company, incorporated by a certain act of parliament, and the promoters of the undertaking mentioned in the Metropolitan Railway (Tower Hill Extension) Act, 1864; and that in the exercise of the powers conferred on them by the said act, and the acts incorporated therewith, the defendants did on the 22nd day of February, 1866, give to the plaintiff notice that for the purposes of their undertaking they required to purchase and take certain lands and premises therein mentioned belonging to the plaintiff; that the plaintiff had a greater interest in the lands and premises than as tenant for a year, or from year to year; that the compensation claimed by him exceeded 50*l.*; and no agreement having been come to by and between the plaintiff and defendants, as to the amount of compensation to be paid to the plaintiff by the defendants for his interest in the lands and premises, and for the

damage sustained by him by reason of the execution of the works authorized by the said acts, the plaintiff desired to have the same settled by the verdict of a jury and not by arbitration, and gave notice of such desire to the defendants, stating in his notice the nature of his interest in the lands and premises in respect of which he claimed compensation, and the amount of the compensation so claimed by him; that he duly required the defendants to issue a warrant to the sheriff of the county to summon a jury to assess such compensation in manner required by law, and the several statutes in that behalf; that all conditions had been fulfilled, &c., to entitle the plaintiff to have the defendants issue their warrant to such sheriff to summon a jury to determine the amount of the compensation; and that a reasonable time in that behalf elapsed before suit; that the plaintiff had been and was personally interested in the performance by the defendants of their duty to issue the warrant, and had sustained and would sustain damage by the non-performance by the defendants of their said duty; and performance of the said duty by the defendants had been demanded by the plaintiff of the defendants, yet they had wholly neglected and refused, and still neglected and refused, to perform the same, and to issue their warrant to the sheriff; and the plaintiff claimed a peremptory writ of mandamus to the defendants, commanding them to issue their warrant to the sheriff to assess the compensation and 1000*l.* damages.

Demurrer and joinder.

Keane, Q.C. (*Horace Lloyd* with him), for the defendants. The question in this case is shortly whether an action of mandamus will lie to enforce the issuing of a warrant to the sheriff to summon a jury to assess the value of land taken by a railway company. The action for a mandamus was introduced by the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125). From the 68th section of that act it appears that a person claiming a mandamus must be the *plaintiff in an action* other than ejectment or replevin, the exceptions being probably made because those actions in themselves enforce the doing of the acts, for the neglect of which they are brought. If, therefore, there is no right of action independently of it, an application for a mandamus cannot be sustained.

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[WILLES, J. The section expressly gives a right to claim a writ of mandamus independently of any other demand.]

That only means that a plaintiff who has a right of action may waive the right to damages and proceed only for a mandamus.

The declaration in the present action shews no right of action, for the mere neglect of the defendants to issue a warrant gives rise to no such right. In almost all cases there is some delay in issuing the warrant, and if the Court decides that such delay is actionable, it will give rise to endless litigation. No doubt, as soon as the notice to treat is given, there is an implied agreement by the company to give compensation for the land: *Burkinshaw* v. *Birmingham & Oxford Junction Railway Company* (1), but it is such compensation only as is laid down in the act, and that is measured by the value of the land at the time the notice is given, and the injury actually done by the company taking the land, and the act says nothing of any compensation for inconvenience caused to the owner between the time that the notice to treat is given and the time when the payment for the land is made. It is often right that some time should elapse before the issuing of the warrant, in order that the whole injury occasioned to the owner of the company's works may be known: *Ex parte Parkes.* (2)

[ERLE, C.J. That is met by the averment in the declaration, that a reasonable time had elapsed before suit.

BYLES, J. If a tenant who is about to sow his arable land receives a notice from a railway company that they are about to take it, and is thus led not to proceed with the sowing, can the company leave him with the land useless on his hands till they choose to issue their warrant?]

He should abandon it to the company, and claim from them compensation for the injury he has thereby sustained. Again, an action will not lie for delay in the payment of an unascertained sum of money: *North* v. *Wingate* (3); *Sedgwicke* v. *Richardson* (4); Mayne on Damages, p. 2; and the amount of compensation is an unascertained sum. If this action could succeed, the plaintiff would necessarily recover his costs under the 32nd section of the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), but

(1) 5 Ex. at p. 486; 20 L. J. (Ex.) 246.
(2) 9 Dowl. 614.
(3) Cro. Car. 559.
(4) 3 Lev. 374.

such costs are not payable if the owner is awarded by the jury less than the company offered: *Reg.* v. *Waterford and Limerick Railway Company* (1); or unless the plaintiff can shew that the writ has been acted on: *Reg.* v. *Bingham.* (2) By s. 74 it is provided that the Court may direct that the act required to be done may be done by the plaintiff, or some other person appointed by the Court, at the expense of the defendant; but in the present case the warrant must be issued by the company, or the terms of the act of parliament would not be complied with, and the sheriff would not be bound to obey it; the act, therefore, cannot be one which was intended to be the subject of an action for a mandamus. Under s. 69 the plaintiff must set forth in his declaration that he sustains, or may sustain, damage from the non-performance of the act, to enforce which the writ of mandamus is sought. This is not sufficiently complied with by a mere averment in the declaration to that effect, but the plaintiff must shew that he has sustained or will sustain special damage, and what that damage is, that the Court may judge of it; in the present case the plaintiff has not shewn that he has sustained or will sustain any actual damage.

W. G. Harrison, for the plaintiff. The declaration is good on two grounds. First, an action of mandamus may be brought even when no other action would lie, or has been commenced; and secondly, in the present case an action does lie and has been commenced. In order to understand the provisions of the Common Law Procedure Act, 1854, with relation to writs of mandamus, it is necessary to notice the evils which were to be remedied. These are set out in the report on which the act was founded. They were mainly the tediousness, expense, and uncertainty of the proceeding by writ of mandamus in the Queen's Bench, and the fact that its issue was decided upon affidavits; and was in the discretion of the judges, and not ex debito justitiæ. The act adopts most of the recommendations of the report, and provides that in any action, except ejectment and replevin (in which there is a specific judgment, and therefore can be no need of a writ of mandamus) *with any other demand*, or *separately*, there may be a claim for a mandamus: "separately," must mean apart from any other claim, so that the act in fact creates a new species of action, viz.

(1) 13 Irish Law Rep. 272. (2) 4 Q. B. 877.

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an action for a mandamus; accordingly s. 69 uses the expression *such action*, which must mean the action for mandamus; and in s. 75 the expression "action for mandamus" is actually used. It is clear, from s. 69, that it is sufficient if the plaintiff *may* sustain damage he need not shew that he has sustained any. By s. 70 the pleadings are to be the same as in an ordinary action for the recovery of damages, shewing that an action of mandamus is not such. There is no difficulty in the fact that the warrant must be issued by the company, because the Court may order its officer to take the company's seal and seal the warrant, and then it will be the act of the company. In *Marriage* v. *Eastern Counties and London & Blackwall Railway Companies* (1), and *Benson* v. *Paull* (2), there were no claims for damages, but the objection was not taken; and in *Norris* v. *Irish Land Company* (3), the judgment of Lord Campbell went the whole length now contended for by the plaintiff, though it was not necessary for the decision of the case. The plaintiff could not give up the land and treat himself as trustee for the defendants, for it was decided in *Haynes* v. *Haynes* (4) that the notice to treat does not amount to a contract, and the property does not pass.

But secondly, in this case a right of action has accrued to the plaintiff, and a claim for damages is included in the declaration. There is a statutory duty resting on the defendants, and a breach of that duty, by which the plaintiff is hindered of his right either to use the land as he pleases, or else to receive the value of it within a reasonable time; and under the authority of *Ashby* v. *White* (5) the plaintiff has, therefore, a right of action, whether he has sustained any actual damage or not.

Keane, Q.C., in reply. The Lands Clauses Consolidation Act contains an express provision compelling the company to pay the compensation immediately on taking possession of the land, and similar words would have been used respecting the lands named in a notice to treat if it had been intended to make immediate payment necessary in that case also. In *Marriage* v. *Eastern Counties and London & Blackwall Railway Companies* (1), the action was

(1) 9 H. of L. 32; 7 Jur. N.S. 53.
(2) 6 E. & B. 273; 25 L. J. (Q.B.) 274. 26 Jur. 225.
(3) 8 E. & B. 512; 27 L. J. (Q.B.) 115. 4 Jur. N.S. 235.
(4) 1 Dru. & Sm. 426; 30 L. J. (Ch.) 578; 7 Jur. N.S. 595.
(5) 1 Sm. L. C. 5th ed. 216.

for not building a bridge of the required dimensions, and there was no means of getting compensation under the act, and moreover actual damage was shewn to exist.

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ERLE, C.J. I am of opinion that our judgment should be for the plaintiff. The defendants are a railway company, and gave notice to the plaintiff that they should require his land, and thereby created, in accordance with the provisions of the Lands Clauses Consolidation Act (8 & 9 Vict. c. 18), a relation approximating to that of vendor and purchaser, and the plaintiff became entitled, under the provisions of the act, to require that the defendants should proceed to ascertain the value of the land by issuing a warrant to the sheriff to summon a jury for the purpose of assessing it, and then take the land and pay the value so ascertained. In former times persons in the position of the plaintiff have had recourse to the writ of mandamus, issued by the Court of Queen's Bench, to enforce their right, but this remedy was fraught with the disadvantages and vexations so concisely and forcibly set out in the report of the commissioners on which the Common Law Procedure Act, 1854, was framed. The question for us to determine is, whether the plaintiff can now avail himself of the remedy of action for mandamus given in that statute. I am with Mr. Harrison on both the points that he has made. I think that the Common Law Procedure Act, 1854, entitles the plaintiff to bring an action for mandamus against the defendants for not issuing a warrant when he can shew that he has a right to have the warrant issued, and is personally interested in it whether he is entitled to any damages for its non-issue or not. The 68th section provides that "the plaintiff in any action in any of the superior courts, except replevin and ejectment, may . . . claim in the declaration, either together with any other demand, which may now be enforced in such action, or separately, a writ of mandamus commanding the defendant to fulfil any duty in the fulfilment of which the plaintiff is personally interested." Here the plaintiff's claim is of the class entitling him to a remedy by mandamus, being of a quasi public character. The power of disposing of his land as he pleases has been taken away, and beyond all question he has a right to have the warrant issued that he may recover the value of

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the land, or else to have the notice withdrawn, and his power over the land restored to him. I think that even though he had not any cause of action for which he could declare in an ordinary action for damages, yet he would have a right to have recourse to an action for mandamus. The other sections of the act support this view. In s. 75 the very phrase "action for mandamus" is used, which shews that the legislature intended to create a new substantive action. By deciding in this manner we shall afford to railway companies a means of trying at once their right to take lands, which they at present have no means of doing, and shall thus adapt the remedy provided by the legislature to the wants of the community, which the courts are always desirous to do.

I agree with Mr. Harrison also on his second point: wherever a statute gives a right to one person to have an act fulfilled by another, and that other does not fulfil it, a cause of action arises. It is clear that within the principle of *Ashby* v. *White* (1) there was here a duty on the company to issue a warrant to the sheriff, a breach of which would give to the plaintiff a right of action, and there is therefore in this case a substantive cause of action for damages, if that were really necessary.

3 C.B.561

WILLES, J. I am of the same opinion. This case clearly falls within both the language and the reason of the Common Law Procedure Act, 1854. The law as to the recovery of nominal damages to carry costs in mandamus, will be found in *Reg.* v. *Fall.* (2) At the common law, the only way of questioning the return to a writ of mandamus was by an action for a false return, if the plaintiff had sustained private damage; or by information, if the matter was of a public nature and not one by which the prosecutor had individually sustained any private wrong. Under the statute, Anne 9, c. 20, the prosecutor in the first class of cases may traverse the return of the writ, and is then entitled to damages and costs as if he had brought an action for a false return, and 1 Wm. 4, c. 21, s. 3, extends this right to the second class of cases also. Therefore, even before the Common Law Procedure Act of 1854, the party applying for a writ of mandamus in the Queen's Bench, could recover damages for the non-fulfilment of

(1) 1 Sm. L. C. 5th ed. 216. (2) 1 Q. B. 636; 10 L. J. (Q.B.) 145.

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the duty, and his costs of suit. The only question now is, whether the plaintiff fulfils those conditions which entitle him to the easier remedy introduced by the Common Law Procedure Act, 1854, and the arguments brought forward to shew that the plaintiff could not be entitled to damages at all, fall to the ground. The plaintiff in this case does fulfil the necessary conditions, for he is personally interested in the performance of the duty, and has been, or may be, damaged by its neglect. The language of the section which provides that the plaintiff may claim, either together with any other demand or separately, a writ of mandamus, is explained by the provision in the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76, s. 41), that causes of action of any kind may be joined, except replevin and ejectment, which was not allowed by the common law, and the section under consideration was framed so as to enable a claimant in the same action to obtain judgment for his debt, and a writ of mandamus to enforce the making of a rate to satisfy it.

It has been contended that the remedy is limited by s. 74 to cases in which the act could be done by a person other than the defendant, but that section is cumulative, and does not take away the right to compel, by attachment, the defendant to do the act. No injury to the defendants can arise from a writ of mandamus being ordered, if they now issue their warrant, as they can then apply to stay proceedings on payment of costs.

BYLES, J. I am of the same opinion, and for the same reasons. I think the new action for mandamus will lie, whether there is or is not a right to claim damages. That, however, does not seem to arise in this case, because this action is brought to recover damages as well as for a mandamus.

A claim for a mandamus cannot be added in every action for the breach of a duty, notwithstanding the large words of the 68th section of the Common Law Procedure Act, 1854, "any duty in which he is personally interested," for it cannot have been intended that specific performance should be enforced of every personal contract. Lord Campbell says, in *Benson v. Paull* (1), that an action for mandamus may sometimes lie when the old writ of mandamus

(1) 6 E. & B. 273. 2 Jur. N.S. 425

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would not have been issued, but that at any rate, when there is a public or official duty, or a duty created by statute, such an action will certainly lie, and the duty now in question is within that class. It is clear that the intention of the legislature was to introduce an adequate legal remedy in those cases in which there was no such remedy before, and in the present case damages would not afford a reasonable compensation. The owner cannot tell till the warrant is issued in what way to use his land, whether to treat it as his own, or leave it for the company to take possession of, and whether he can, if he wishes, sell it or not.

KEATING, J. I am of the same opinion. This case comes within the Common Law Procedure Act, 1854, s. 68, which in terms refers to a claim for a mandamus being made together with or *separately* from a demand for damages. That being so, s. 69 sets out how the declaration shall be framed, and every term of that section is satisfied by the present declaration. I will only add that if this case had not come within the provisions of the statute, it would have been a grievous omission, as I know of no case in which this remedy is more suitable and more required.

Judgment for the plaintiff.

Attorneys for plaintiff: *Boulton & Sons.*
Attorneys for defendants: *Burchells.*

Nov. 16.

BRACEWELL AND OTHERS *v.* WILLIAMS.

Contract—Consideration—Bankruptcy—Application for Costs.

A promise not to apply for costs, under the 85th section of the Bankruptcy Act, 1849 (12 & 13 Vict. c. 106), is a sufficient consideration to support a contract to pay the amount of such costs.

A promise to conduct proceedings in bankruptcy so as to injure as little as possible the debtor's credit, is not a good consideration to support a contract.

DECLARATION. First count, that the plaintiffs by the judgment of the Court recovered against the defendant 706*l.* 7*s.* 3*d.* debt, and 4*l.* costs, in an action brought by the plaintiffs against the defendant, and the plaintiffs, for compelling payment by the defendant

of the said debt, had, before the recovery of the judgment, caused to be duly issued out of the Court of Bankruptcy (then having jurisdiction in that behalf) a trader debtor summons, under the 78th section of the Bankruptcy Consolidation Act, 1849, requiring the defendant to appear in the said court as to the debt, and the defendant thereupon signed an admission out of court in the manner provided by the 84th section of the act, confessing that he was indebted to the plaintiffs in the sum of 706*l.* 7*s.* 3*d.*; that the plaintiffs incurred certain costs of the summons and the proceedings thereon, and thereupon, the proceedings in bankruptcy being pending, in consideration that the plaintiffs would accept payment of the debt of 706*l.* 7*s.* 3*d.*, and would not prosecute the proceedings in bankruptcy, the defendant promised the plaintiffs to pay the costs so recovered, and the costs of the proceedings in bankruptcy, on a day elapsed before suit; and everything had been done &c., yet the defendant had not paid the costs of the proceedings in bankruptcy.

Second count: after alleging the recovery of the judgment, and the issue of the trader debtor summons, as in the first count—that thereupon on the 3rd day of January, 1865, in consideration that the plaintiffs would, until the time appointed for payment as thereinafter mentioned, conduct the proceedings so as to avoid as far as possible injuring the defendant's credit, the defendant promised the plaintiffs to pay the debt and the costs of the proceedings at law and in bankruptcy, as between attorney and client, on the 12th day of January, 1865, and everything had been done &c. to entitle the plaintiffs to recover in the action, yet the defendant had not paid the costs of the proceedings as between attorney and client.

Third plea to the first count, that the alleged admission was signed after the issuing of the summons, before the day appointed therein for the appearance of the defendant in the Court of Bankruptcy, and was filed in the court on the day appointed for such appearance, and that the defendant tendered and offered to pay to the plaintiffs, and the plaintiffs accepted payment of the debt and demand, as in the first count mentioned, within seven days next after the signing and filing of the said alleged admission.

Demurrer to the second count and third plea.

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Jones, Q.C., for the plaintiffs. The third plea is bad. The 85th section of the Bankruptcy Act, 1849 (12 & 13 Vict. c. 106), entitled the plaintiffs to such costs as the Court should think fit, and they would therefore have been justified, notwithstanding that their debt had been paid, in making an application to the Court with that view. They agreed to give up this as well as all other proceedings in bankruptcy, on condition that the defendant would pay the debt and the costs; he has paid only the debt, and the third plea really amounts to this, that he has fulfilled half his promise, and therefore need not fulfil the rest. The second count shews a sufficient consideration; the plaintiffs were entitled to conduct the proceedings in the ordinary way, but could lessen the injury to the defendant's business by leniency in the mode of conducting them. The promise to do so was a sufficient consideration for the defendant's contract.

J. R. Williams, for the defendant. The consideration alleged in the first count is the plaintiffs' promise not to prosecute the proceedings in bankruptcy. The third plea sets out facts which shew that the plaintiffs could not take such proceedings, and that, therefore, their promise not to do so was no consideration. An application for costs, even if it could be made, is not a proceeding in bankruptcy, for the debt having been paid within the time provided by the act (s. 81), no act of bankruptcy was committed, and therefore there could be no proceedings in bankruptcy.

[WILLES, J. It seems there could be under s. 85.]

With respect to the second count he was stopped by the Court.

ERLE, C.J. I think the third plea is bad. The plaintiffs had a contingent right to get the costs of the proceedings which they had taken if the judge chose to give them: therefore it was a good consideration for the promise of the defendant to pay those costs that the plaintiffs should give up that contingent right. The second count is, I think, also bad; it really amounts to this, in consideration that I do not abuse the process of the Court for a purpose other than that for which it was intended, viz. the recovery of my debt, by using it as a means of exposure of you, you will

perform your promise. The consideration, therefore, is really the abstaining from an abuse of the process of the Court.

WILLES, BYLES, and KEATING, JJ., concurred.

Judgment for the plaintiffs on the demurrer to the third plea, and for the defendant on the demurrer to the second count.

Attorney for plaintiffs: *H. J. Naters, for H. D. Robinson, Settle, Yorkshire.*

Attorneys for defendant: *Johnson & Weatheralls.*

WRIGHT AND ANOTHER *v.* HICKLING AND OTHERS.

Nov. 21.

Principal and Surety—Money Club, Promissory-note for a Loan by—Appropriation of Payments.

The surety on a promissory-note given to secure a loan to a member of a money club formed for the purpose of raising money by means of monthly subscriptions, and lending it in small sums at interest to the members, and dividing the proceeds when the shares are fully paid up and the loans repaid, cannot rely upon the monthly subscriptions and premiums paid by his principal, as payments in reduction of his liability upon the note.

THIS was an action against the defendants as the makers of a joint and several promissory-note for 36*l.*, bearing date the 8th of May, 1863, and payable on demand, with 2½ per cent. per annum interest; with a count for interest and upon an account stated.

The defendants, H. Mitchell, and H. Mitchell the younger, pleaded—first, to the first count, that they did not make the note, —secondly, to the residue of the declaration, never indebted,— thirdly, payment before action,—fourthly, to the first count, for a defence on equitable grounds, that they made the note jointly with Hickling, and as his sureties only, to secure a debt due to the plaintiffs from Hickling solely, of which the plaintiffs at the time of the making of the note had notice, and except as aforesaid there never was any value or consideration for the making or payment of the said note by the defendants; and that, after it became due, the plaintiffs, whilst they were the holders of the said note, did

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without the consent of the defendants, and for a good and sufficient consideration in that behalf, agree with Hickling to give him, and then accordingly gave him, time for the payment of the said note beyond the time when the same was due and payable. Issue thereon.

At the trial before Keating, J., at the sittings at Westminster after last Trinity Term, the facts were as follows:—The plaintiffs are the trustees of a loan club called the Sherwood 20*l.* Club, which consists of upwards of seventy members, and was formed for the purpose of raising money by means of monthly subscriptions, and lending it in sums varying from 5*l.* to 20*l.* to the members. The club was to remain in existence until each member had received the amount subscribed by him, and till all arrears and fines had been paid up. The meetings were held once in every four weeks at the Dolphin Inn, North Church Street, Nottingham. The first meeting was held on the 22nd of October, 1862. The defendant Hickling became a member on the eighth monthly meeting, but paid his subscriptions from the sixth meeting, for four shares. By the rules of the club each member paid 8*s.* per month subscription upon each share; and, when he wished to become a borrower to the extent of a share or shares, he bid for it at a meeting when the money was put up to competition, and advanced to the member who was willing to pay the highest premium for it, the purchaser paying interest at 2½ per cent. by monthly instalments, and also a monthly instalment of 4*s.* per share so bought out on account of the premium, and 3*d.* per month for "spending money." The borrower then gave a promissory-note for sum advanced to him, payable on demand, with 2½ per cent. interest, with two sureties.

Hickling on the night he entered the club, viz. the 6th of May, 1863, was the highest bidder for a sum of 36*l.*, which represented two shares (1), for which he agreed to pay a premium of 3*l.* 14*s.* per share, and accordingly the money was advanced to him and the note declared on given by him with the other two defendants as his sureties. He also obtained a similar advance on the 13th of January, 1864, at a premium of 1*l.* 12*s.* 6*d.* per share, giving a further note for 36*l.*, with one Udale as his surety.

(1) These two shares were treated as of the value of 18*l.* each only, Hickling not having commenced his monthly payments until the sixth night.

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Down to the 13th of January, 1864, Hickling regularly paid at each of the monthly meetings 2*l.* 1*s.* 11*d.*,—being 1*l.* 12*s.* for his subscription of 8*s.* per share, 8*s.* towards the premium on the two shares bought out on the 6th of May, 1863, 1*s.* 8*d.* for interest, and 3*d.* spending money. On the 10th of February, 1864, which was the eighteenth monthly meeting of the club, and down to the 1st of June, the twenty-second monthly meeting, he regularly paid 2*l.* 11*s.* 7*d.* each meeting, being 9*s.* 8*d.* additional in respect of the premium and interest on the second loan. After this his payments became irregular; and on the winding up of the club, which took place at the forty-sixth monthly meeting, Hickling was found to be indebted to the club in 29*l.* 1*s.* 6*d.*

One of the sureties on the first note (H. Mitchell the elder) died after the cause was at issue, and before the trial, and his death was duly suggested upon the record.

Interrogatories had been administered to the plaintiffs, in answer to one of which they admitted that the payments made by Hickling had been made generally on account of his debt to the club.

It was thereupon submitted, on behalf of the surviving surety, that he was discharged by time having been given to the principal without his consent; and the case of *Pooley* v. *Harradine* (1) was relied on: and it was further contended that the payments made by Hickling must be applied in the first instance in discharge of the earlier note, or that, at all events, the eleven payments which were made before the second loan was contracted, and a moiety of those made subsequently, must be so applied, in which case the liability of the surety would be satisfied.

A verdict was taken for the plaintiffs for 29*l.* 1*s.* 6*d.*, leave being reserved to the defendant Mitchell to move to enter a verdict for him if the Court should be of opinion that either of the above points afforded an answer to the action.

Nov. 6. *Biron* obtained a rule nisi accordingly.

Nov. 21. *L. W. Cave* (*Hayes, Serjt.*, with him), shewed cause. *Lomas* v. *Bradshaw* (2) is an authority to shew that a court of law cannot take notice of the equitable rights of the members of an association like this. The sums paid by Hickling were paid in

(1) 7 E. & B. 431: 3 Jur. N. S. 488. (2) 9 C. B. 620.

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respect of the premiums, or in his character of subscriber to the club, and not in his character of maker of the note. The two are totally distinct.

[WILLES, J. That is clear, from the case of *Bedford* v. *Bruton*. (1)]

In *Plomer* v. *Long* (2), it was held that a payment by the obligor of a bond to the obligee, to whom the obligor was also otherwise indebted, could not, without some circumstances to shew that it was intended to be made in discharge of the bond, be so applied in favour of the surety, in an action upon the bond, under a plea of payment. Then, there was no giving of time to the principal debtor. There was nothing to prevent the plaintiffs, as trustees for the club, suing upon the note at any time. If the first argument be well founded, it equally answers the second branch of the rule.

Biron, in support of the rule. Mitchell, the surety, was not a member of the club.

[KEATING, J. He knew when he became surety that it was in respect of a club matter.]

He knew that payments were being made from time to time by his principal in reduction of his liability. And, if all the payments which were made by Hickling before the second loan was obtained, and a moiety of those made since,—to the benefit of which, according to the case of *Pearl* v. *Deacon* (3), the surety is clearly entitled,—are taken into account, Mitchell's liability on the first note is discharged, under the plea of payment, or at all events would be reduced to 7*l.* 9*s.* The fourth plea is founded upon the case of *Pooley* v. *Harradine* (4), which is a distinct authority to shew that, by giving time to the principal without the consent of the surety, the latter is discharged.

ERLE, C.J. I am of opinion that this rule should be discharged. No time has been given, and no security wasted. Indeed, that point was not seriously urged. The main contention on the part of the surety was, that the monthly payments were to be applied in the reduction of the note sued upon. The case was argued as if the final result when the business of the club was wound up was to

(1) 1 Bing. N. C. 399 ; 1 Scott, 245.
(2) 1 Stark. 153.
(3) 26 L. J. (Ch.) 761 ; 1 De G. & J. 461.
(4) 7 E. & B. 432.

be blended with the promissory-note. But the contract on the note was totally distinct from the engagements of Hickling as a member of the club. The monthly payments in respect of the shares and the premiums and interest specifically appropriate themselves. The notion that the payments on account of the monthly subscriptions could be treated as payments on account of the loan, is altogether putting aside the rights of the club and the chance of there being profit when the concern comes to be wound up. As far, therefore, as any defence on the ground of payment is concerned, the surety has no answer in a court of law.

WILLES, J. I am of the same opinion. The very constitution of this club shews the fallacy of the defendant's argument. In recording the transactions of the club, the payments on account of monthly subscriptions, premiums, and interest, would appear in an account totally distinct from that in which loans were entered. I am clearly of opinion that none of these payments can be set against the note. And, as to giving time, there is no evidence of time having been given to the principal under any binding contract.

KEATING, J. I am of the same opinion. Mr. Cave's argument seems to me to be well founded. The payments for subscription, premium, and interest are all totally distinct from the claim of the trustees upon this note. What may be the result of those payments can only be ascertained when the club is finally wound up. The note is payable on demand, and the liability of the surety thereon is wholly irrespective of the payments made by the principal in his character of a member of the club.

Rule discharged.

Attorney for plaintiffs: *H. B. Roberts, for G. Belk, Nottingham.*
Attorneys for defendants: *G. Cheatle; and Eyre & Lawson.*

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Nov. 29.

[IN THE EXCHEQUER CHAMBER.]

FARNWORTH AND ANOTHER *v.* HYDE.

Marine Insurance—Constructive Total Loss of Goods—Expenses of drying, landing, and re-shipping—Cost of Transit to Port of Destination.

Where goods are in consequence of the perils insured against lying at a place different from the place of their destination, damaged, but in such a state that they can at some cost be put into a condition to be carried to their destination, the jury, in order to ascertain whether there is a constructive total loss of the goods, must determine whether or not it is practically possible to carry them on,—that is, whether to do so will cost more than they are worth: and, in determining this, the jury are to take into account all the extra expenses consequent on the perils of the sea, such as drying, landing, warehousing, and re-shipping the goods; but they are not to take into account the fact that, if they are carried on in the original bottom, or by the original ship-owner in a substituted bottom, they will have to pay the freight contracted to be paid; that being a charge to which the goods are liable when delivered, whether the perils of the sea affect them or not.

Where the original bottom is disabled by the perils of the sea, so that the ship-owner is not bound to carry the goods on, and he does not choose to do so, the jury are not to take into account the whole of the cost of transit from the place of distress to the place of destination which must be incurred by the goods owner if he carries them on, but only the excess of that cost above that which would have been incurred if no peril had intervened.

Rosetto v. *Gurney*, 11 C. B. 176, approved.

THIS was an appeal from a decision of the Court of Common Pleas, discharging a rule to enter a verdict for the defendant, reported in 18 C. B. (N.S.) 835; 34 L. J. (C.P.) 207. The following case was stated for the opinion of this Court:—

1. The action was upon a policy of insurance dated the 13th of November, 1861, effected by Messrs. Burgess & Stock, as agents for the plaintiffs, for 1500*l.*, and underwritten by the defendant for 150*l.*, on the cargo of the ship *Avon* for a voyage from Quebec to Liverpool.

2. The policy expresses the insurance to be on a cargo of wood goods, to be declared and valued thereafter.

3. The defendant pleaded payment into court of 34*l.* 10*s.*, being at the rate of 23 per cent. on the amount underwritten by him.

4. The cargo was ultimately valued at 2500*l.*

7. The cause was tried before Pigott, B., and a special jury, at the Liverpool summer assizes, 1864.

8, 9, 10. The owner of the *Avon* and consignor and owner of the cargo insured was M. J. Wilson, a merchant at Liverpool, who also carried on business as a merchant at Quebec under the style of M. J. Wilson & Co., by his brother C. W. Wilson, who acted as agent and representative of the firm there.

11. Messrs. Burgess & Stock are insurance-brokers carrying on business in London.

12. The plaintiffs are merchants and brokers at Liverpool.

13. The cargo insured was before the effecting of the insurance shipped on account and risk of M. J. Wilson by the Quebec house, and consigned to the plaintiffs, who made advances upon it.

15. After the insurance, and before any declaration of interest, a letter was received by the plaintiffs from the Quebec house, to the following effect:—

"Quebec, November 22nd, 1861.

"Dear Sirs,—By this conveyance you will receive shipping documents of a cargo of wood goods per ship *Avon*, which vessel has sailed. I have valued on you against the above, at ninety days, 1850*l.*, which be good enough to accept on presentation, and please attend to the insurance.

"C. W. Wilson."

16. The plaintiffs then effected another policy on the cargo for 750*l.*, and by a memorandum indorsed on the policy of November 13th, 1861, and dated December 14th, 1861, interest was declared and agreed to appertain to the policy of November 13th, 1861, and the other policy for 750*l.* on cargo of wood goods, valued at 2500*l.*

17. The vessel sailed from Quebec on the 22nd of November, 1861, with the cargo insured on board of her.

18. On the 2nd of December, 1861, the vessel, having encountered very violent weather, was driven on shore at a place called the Brandy Pots, nearly opposite St. André, and about 102 miles

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below Quebec, on the river St. Lawrence. A heavy sea was running, and the ship continued striking for about half an hour, during which time the rudder was unshipped. Masses of ice were being formed, and drifted to and fro in the St. Lawrence with the wind and tide, and the navigation of the river was rapidly closing for the winter. The St. Lawrence at the Brandy Pots is nearly twenty miles wide; it is an exposed situation, and the currents are strong and rapid.

19. In consequence of the severity of the weather and the obstruction caused by the ice, it was found impossible to proceed with the voyage, and, as the only thing to be done, the vessel was put on shore.

20. On the 10th of December, the ship and cargo were surveyed by two surveyors, Messrs. Cotnam and Nesbitt, instructed by C. W. Wilson, the agent for M. J. Wilson.

21. They found the vessel lying broadside to the tide, in a very exposed and perilous position, subject at any time, in their opinion, to be carried off or cut up by the ice with the ebb and flow of the tide. They recommended a sale of the ship and cargo, on account of their perilous position, and from their (the surveyors) having had experience of another vessel similarly circumstanced at Riviére du Loup, but in a much safer position (being high and dry at low water), having been cut through in a great number of places by the ice during the ebb and flood tide.

22. On the 27th of December, M. J. Wilson addressed to the plaintiffs (from London) a letter, in which he wrote, "The *Avon* is likely not to come. The ice in the spring of the year will likely take her away."

23. On the 16th of January, 1862, the ship and cargo were surveyed a second time by Messrs. Cotnam and Nesbitt. They found that the vessel was in a worse position than before, having moved about a mile further down the river, where she was lying on a rocky bottom, or on boulders, surrounded by thick ice, badly hogged and strained, with the water flowing in and out of her. The report of the surveyors, after minutely describing the position of the vessel and the damage she had sustained, concluded as follows:—"These appearers are of opinion that, in consequence of the damages the vessel has sustained, her getting worse every day by

the weight of her timber cargo in shallow water, lying on boulders, and straining with the ice, the expense of raising and repairing her would exceed her value when so repaired, especially as she is an old ship, even should she remain where she is until the spring, which, owing to her exposed situation, is not at all probable. They, therefore, recommend that the vessel, as she now lies, and her materials, be sold by public auction at Quebec, for the benefit of all concerned."

24. Upon this survey being made, Mr. Henry Fry, Lloyd's agent at Quebec, to whom it was at once communicated (but who had not seen the *Avon*, or the place in which she lay), wrote to Mr. M. J. Wilson the following letter:—

"Lloyd's Agency, Quebec, Jan. 22, 1862.

"Sir,—I have carefully read over the report of survey held on the *Avon* by Messrs. Cotnam and Nesbitt, and regret that, upon the facts therein stated, I have come to a very different conclusion to those gentlemen.

"It appears that the ship is lying some eighty-five miles only from Quebec, on the south shore, and easily accessible by railway; that her cargo is wood; that all her masts, yards, and materials are intact; that the ice is firm all round her; and that there is no danger of her moving till the month of March. It also appears that the ship is so covered with ice that a very imperfect survey at best could be made. In addition to the ascertained damage, the surveyors lay great stress upon the ship's age, and the probability of her being carried away by the ice in the spring.

"I do not think the ascertained damage, as described in the survey, sufficient of itself to warrant a condemnation. Any further damage is, of course, mere conjecture.

"As to the risk of her being carried away by the ice, I place very little importance on that; for, of all the numerous ships wrecked between Quebec and Bic in the winter of 1853-4, I am not aware that one suffered materially or moved far on the breaking up of the ice. But this is a risk of the underwriters; and a ship cannot be legally condemned upon mere probabilities. Moreover, if, as the surveyors state, she has been driven up so far that

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she will have to be lightened before she will float, there cannot be much risk of the ice carrying her away.

"The course I recommend on behalf of the underwriters is that a proper watch be kept on the ship during the winter, and that, before the ice breaks up, a sufficient number of men be placed on board to prevent any claims for salvage; and that, as soon as the navigation is open, she be towed up to Quebec, and the cargo discharged. A proper survey can then be held: and if, as is very probable, the damage be found too serious to warrant repair, she can be legally condemned and sold, and the cargo can be forwarded to its destination at a very trifling cost. The ship and materials will fetch a far higher price then than now, as any purchaser would form an exaggerated notion of the risk from ice, and give a price accordingly. I believe that, with the high spring-tides in May, the ship will float, or nearly so, with her whole cargo; and the expense of bringing her up will not be heavy, whilst the cargo will bear its proportion.

"On the other hand, if the ship is forced to an immediate sale, she will fetch but little. Claims may be made for salvage of cargo, or it may be landed where the ship lies, and thus sacrificed. Besides, there is ample time to lay the survey before the underwriters, and get their reply before March. Under these circumstances, I protest against any sale of the ship or cargo until the views of the underwriters are known. A copy of this letter will be forwarded to Lloyd's.

"Henry Fry, Agent to Lloyd's."

25. The defendant, agreeing in the view taken by Mr. Fry, Messrs. Burgess & Stock, on the 10th of February, 1862, addressed the following letter to the plaintiffs:—

"Dear Sirs,—There has been a letter received at Lloyd's from the agent at Quebec, stating that a sale of the *Avon* and her cargo had been contemplated, and he had stopped it. The underwriters on the cargo, which we have insured for you, called our attention to this, and suggested that we had better write and inform you of it, so that you may protect your interest; as they say, from the tenor of the Lloyd's agent's letter, they would not recognise the sale, if it took place."

26, 27. On the 15th of February, 1862, the plaintiffs sent to M. J. Wilson's Quebec house a copy of the letter of Messrs. Burgess & Stock of the 10th of February; and on the same day they sent a letter to Mr. M. J. Wilson, intimating to him that they had done so.

28. On the 14th of March, 1862, M. J. Wilson's Quebec house sent to the plaintiffs the following letter:—

"Gentlemen,—Your favour of the 15th ult., inclosing copy of letter from your insurance-broker, is to hand. The remarks contained therein have my attention. Doubtless Mr. C. W. Wilson has already informed you fully respecting the state of the *Avon* and the cargo. To him I beg to refer you, as I keep him advised each mail of any change that takes place."

29. At the approach of the spring, viz. in April, 1862, Pierre Valin, a ship-builder of fifteen years' experience, and Charles R. Coker, Lloyd's surveyor at Quebec, were required by the captain of the *Avon* to make a further survey of the ship and cargo as they then lay. Their survey, which was dated the 2nd of May, 1862, stated in substance as follows:—

"Found the wales, on the larboard side for eleven strakes, and the starboard side for eight strakes, badly cut and chafed, bolts broken and treenails all started fore and aft. On the larboard side, in wake of fore-chains, there are five strakes, and at main-chains two strakes, cut through, and timbers broken; sheathing under counter and on places at both sides of bottom all fore and aft chafed, and partly gone; rudder gone; braces strained and started; water ebbing and flowing in and out of her every tide; scarphs and butts of rails, waterways, deck-plank, sheers, sheer-strakes, topsides, wales, and plank of bottom, are open from three quarters of an inch to one inch all round; treenails on both sides in wake of main hatch are broken. Besides the above-enumerated damages, the general appearance of the vessel is such as to give us reason to suppose that all her securities have more or less given way. We are of opinion that the great expense which would be incurred, taking into consideration her age and appearance, to put the ship in a seaworthy state, does not warrant us in recommending her

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to be brought up. We therefore recommend, for the interest of all parties concerned, that the vessel be sold where she now lies.

"C. R. Coker, Surveyor to Lloyd's.

"N.B. Before the vessel can be taken off, it will be necessary to discharge cargo. From the exposed position and the strong current always running, we think there would be very great risk and cost. We are therefore of opinion that it would be the most prudent course to sell the timber at the same time the vessel is sold."

30. The vessel and cargo were thereupon sold by auction on the 7th of May, 1862, the ship for 450*l.*, and cargo for 750*l.* They were both bought by Mr. Julien, a Quebec ship-builder, who stated, that, after thorough examination (so far as he could without being able to get round her outside), in which he was assisted by his brother, also a ship-builder, he came to the opinion that her bottom had come out, and that it would therefore be impossible to get the ship off. He also stated that he found after he saw her that the danger to which she was exposed was that of being drifted off, there being no anchor to hold her. He accordingly proceeded to dismantle the ship, and save what he could of the gear and standing rigging. This was done for two days, any copper to be found being stripped off. In fine, he did damage to the ship to the amount of 100*l.* before he thought of trying to float her. Subsequently, the vessel having been left high and dry by a very low tide, they were able to get round her and make a more thorough examination than before; and after this inspection they determined to try and float the vessel, and with that view to stop up the openings in her bottom, which they did, and found that they could keep her sufficiently clear of water to enable her to float.

The following was the description given by Mr. Julien of the subsequent operations:—"When we worked the pumps during the first tide, we found that the stern was raised, but not sufficiently to allow the vessel to float. She assumed a horizontal position at low water. We then opened the scuttle and let the water out, and waited the next tide; and, having the pumps again repaired, the men went to work to the pumps, and we were hauling upon a

kedge-anchor, and she moved about four feet, and stuck there again. The tide then rose a little higher, and, the breeze blowing off the shore, we got her off, and grounded again at a distance of about two cables' length. The tide was then falling, and the ship was full of water. There were ten feet of water in her. There the ship remained for that tide. I went ashore and telegraphed for a steamer; and, the same evening, the *Napoleon III.*, one of the government steamers, came down and anchored all night at the Brandy Pots, and in the morning she came, and at the top of high water we got her off, and she towed her up. When she first floated the tide was unusually high; and the people down there said that it was such a tide as was very rarely seen. We reached Quebec in about twenty-four hours. We had nineteen hands at the pumps, and pumped all the way up."

This witness and his brother were examined on the part of the defendant; but their evidence was read for the plaintiffs. The other circumstances given more in detail in which the ship and cargo were on the 7th of December, 1861, and in which they remained up to the time of their being sold, together with the expenses incurred meanwhile in reference to them, were set out in the evidence taken under the commission.

31. The ship, having been thus floated off, was taken to Quebec, where she arrived, with all her cargo on board, on the 17th of May, 1862.

32. The ship was repaired by the purchasers, and the cargo sold by them for more than double the price given for it at the auction.

33. The repaired ship was likewise sold, but at a price less than the sums expended for repairs and for the purchase of the ship. The purchaser, however, stated that, but for the extraordinarily high tide above referred to, it would have been necessary to have discharged a large portion of the cargo to get the ship off; that it would have cost a great deal of money; and that he would have been exposed to a great deal of risk of losing the cargo or a portion of it: and he further said that in his opinion he should have lost money by the operation.

34. No notice of abandonment was ever given. The plaintiffs first received intelligence of the survey of the 2nd of May, 1862,

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and of the intention to sell, and of the actual sale itself, by the same post.

35. The plaintiffs at the trial gave in evidence that the value of the cargo, if it had been sent on and had arrived in Liverpool, would have been 4300*l.*; or, deducting the original freight (1556*l.*), 2744*l.*

36. The plaintiffs also proved that the only mode of attempting to send on the cargo in another ship from the wreck would be first to land the timber and pile it on shore, then raft it down the river to a vessel brought down from Quebec for the purpose, and there re-load it as weather permitted. The expense of so discharging the cargo from the vessel, and forwarding it to its destination by another vessel, would have been as follows:—

	£	s.	d.
The cost of landing it would have been .	350	0	0
To raft it to another vessel, and re-load it .	700	0	0
Increased freight, in addition to the original freight of 1556*l.* (freights having risen between the date of the original shipment and of the opening of the navigation of the river, when another vessel could have been chartered)	296	0	0
Additional freight that would have been charged for lying off to take the cargo from where it was stored, instead of loading at Quebec	700	0	0
	£2046	0	0

37. Two witnesses were in addition also called by the plaintiffs to prove the amount of damage which the cargo would have sustained by having lain in the hold of the ship during the winter. One of them estimated the amount of such depreciation at 5 per cent. on the Liverpool value, or 215*l.*; the other at 12 per cent., or 515*l.*

38. Further, one of the witnesses called by the plaintiffs, who had been a merchant of twenty years' standing in Quebec, who had

great experience of the river St. Lawrence and of wrecked ships and cargoes therein (but who had not seen the *Avon* or her cargo), stated that the bringing of the cargo on rafts from the shore to the ship would be subject to great risks, and that this operation could not possibly be effected in the month of May, which he stated is in the St. Lawrence a very boisterous month, and one during which no vessel could safely lie in the river to receive the cargo. Other witnesses also spoke of the difficulty of procuring a ship at all for the required purpose, and also to the risk and probability of loss of cargo in the course of the rafting from the ship to the shore, and then re-rafting from the shore to the second ship. They further stated that there is at this part of the river a very considerable sea generally running, and that that would not only expose the cargo to risk of loss, but also render it more difficult to load the ship, as only in calm water would it be safe to open the ship's ports to receive cargo.

39. One of the surveyors who was examined for the plaintiffs in the cause, and who saw the cargo on the occasion of the survey in April or May, 1862, stated that the cargo itself had not been damaged during the winter, as far as he could see, and he did not suppose that it was.

40. On the trial the plaintiffs contended that the evidence shewed that they were entitled to recover for a total loss, without notice of abandonment.

41. The defendant, on the other hand, contended that there was no evidence of a total loss, either with or without notice of abandonment; and that the sum paid into Court was more than sufficient to cover the average loss shewn to have been sustained.

42. The learned judge stated that he should leave certain questions to the jury, and directed them to consider,—first, whether the sale of the ship was justifiable, and that, whether the sale of the ship was justifiable or not, would depend on the consideration whether a prudent owner uninsured would have sold the ship or not, and that his judgment should be governed by the consideration whether if he should repair the ship she would be worth more to the owners than the repairs would cost,—secondly, whether it was right to sell the cargo, and that, whether it was right to sell

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the cargo or not, would depend on whether the cargo could have been practically carried to its destination, and that his Lordship meant the word "practically" to be understood in its mercantile sense, and that, whether the cargo could be practically carried to its destination would depend, under all the circumstances, on whether the cost of bringing the cargo, added to the amount of depreciation, would have left any appreciable margin of profit.

43. The jury found that it was right to sell the ship, and that it was right to sell the cargo; and thereupon the learned judge ordered a verdict to be entered for the plaintiffs for 80*l.* 18*s.* 3*d.* beyond the sum paid into court, and gave leave to the defendant to move to set aside that verdict, and enter a verdict for the defendant, or a nonsuit, on the ground that there was no evidence of a total loss, and no evidence of a partial loss exceeding the sum paid into Court, or to reduce the damages to the sum actually due as for a partial loss: and it was at the same time agreed that, if the Court should be of opinion that the loss was not total, the amount of the partial or average loss should if necessary be corrected by the Court or by an arbitrator to be agreed upon.

44. A rule nisi was accordingly obtained in Michaelmas Term, 1864. This rule was argued at the sittings in banc after Hilary Term, 1865, and was afterwards discharged: see 18 C. B. (N.S.) 835; 34 L. J. (C.P.) 207.

May 12. *T. Jones* (*E. James, Q.C.*, with him), for the appellant, the defendant below. The only question for consideration is, whether the circumstances which preceded the sale of the ship and cargo shewed a constructive total loss: the sale itself is a neutral and indifferent act. The Court below held that the circumstances justified the jury in finding a total loss; and that notice of abandonment was not necessary, inasmuch as the information of the loss and of the sale reached the assured at the same time. The ground of that judgment was, that the sale was justified by the circumstances in which the subject of insurance was placed, and the fact that the cost of carrying the cargo to its destination would have exceeded its value when it arrived, or at all events would have left an inappreciable margin of profit. In the case of a ship, the question always is, whether the damage arising from the perils

insured against has placed her in such a situation as that a prudent owner uninsured would sell: Arnould on Insurance, 3rd ed. p. 955. The general rule is well stated by Bayley, B., in *Gardner* v. *Salvador* (1), where he says: "I know of no such head of insurance law as loss by sale. If the situation of the ship be such that by no means within the master's reach it can be treated so as to retain the character of a ship, then it is a total loss. If the master, by means within his reach, can make an experiment to save it, with a fair hope of restoring it to the character of a ship [*i.e.* a sea-going vessel], he cannot by selling turn it into a total loss. Bona fides in the master will not decide the question; for, if he sells erroneously what is entitled to the character of a ship, though he thinks it a wreck, it will not do." *Knight* v. *Faith* (2), where all the prior authorities are discussed, adopts the same view. The like rule prevails in the case of goods: see the judgment of Lord Abinger, C.B., in *Roux* v. *Salvador*. (3) No decision is to be found contravening the rule laid down in *Knight* v. *Faith*. (2) The matter was discussed, but not determined, in *King* v. *Walker*. (4) That notice of abandonment is necessary in such a case as this, seems to be conceded by all the text-writers on the law of insurance: see Marshall on Insurance, 4th ed. pp. 449, 450, 451; Arnould on Insurance, 3rd ed. p. 918; Phillips on Insurance, 3rd ed. pp. 233, 234; and see the judgment of Lord Campbell in *Fleming* v. *Smith*. (5) The dictum of the Court of Common Pleas in the judgment delivered by Tindal, C.J., in *Roux* v. *Salvador* (6), has never been questioned. "As notice of abandonment," they say, "under the circumstances of this case, is an act of no difficulty to the assured; of great service to the underwriter; as it is well calculated to prevent fraud; as it is consistent with the general understanding which has prevailed in practice, and is sanctioned by the authority of decided cases,—we think it was a necessary preliminary to the plaintiff's right to sue for a total loss in the present case." The Exchequer Chamber treated the loss in that case as an absolute total loss, because the goods never could have arrived at their

(1) 1 M. & Rob. 116, 117.
(2) 15 Q. B. 649; 19 L. J. (Q.B.) 509.
(3) 3 Bing. N.C. 266; 4 Scott, 1.
(4) 3 H. & C. 209; 33 L. J. (Ex.) 325.
(5) 1 H. L. 513, 535.
(6) 1 Bing. N.C. at p. 544.

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destination in specie. But, so long as a total loss is not inevitable, so long as it is possible that the cargo may reach its destination in specie, the loss is only an average loss, and not total. Here, the cargo unquestionably might have been carried to Liverpool, with a deterioration at the most of 12 per cent. The majority of the Court below assume that the expense of forwarding the cargo to Liverpool would have exceeded its value when it arrived there. The figures given in paragraphs 35, 36, and 37 of the case shew a balance left of 183*l.*; and there is no evidence to go to the jury that that 183*l.* is a sum which would represent the value of timber which would be lost in the removal. Upon this point the judgment of Byles, J., in the court below is well entitled to consideration, viz. that, on the assumption that such a diminution of quantity was proved, the expenses of bringing home the cargo should be calculated on the diminished quantity. To constitute a constructive total loss, it must be shewn that the repairs in the case of ship, or the cost of transport in the case of goods, will equal or exceed their value on arrival: *Grainger* v. *Martin*. (1) The rule is broadly laid down in the judgment of Jervis, C.J., in *Rosetto* v. *Gurney* (2), where it is said: "The question to be submitted to the jury will be,—was it practicable to send the whole or any part of the cargo to its place of destination, Liverpool, in a marketable state? To determine this question, the jury must ascertain the cost of unshipping the cargo, the cost of drying and warehousing it, the cost of transhipping it into a new bottom, and the cost of the difference of transit, if it can only be effected at a higher than the original rate of freight. Add to these items the salvage allowed in proportion to the value of the cargo saved; and the loss will be total, if the aggregate exceed the value of the cargo when delivered at Liverpool, the port of discharge. But, if the aggregate do not so exceed the value of the cargo, or of that part of it saved, the loss will be partial only." That was a question of constructive total loss. Notice of abandonment had been given. Similar doctrine is laid down by the Court of Exchequer in *Reimer* v. *Ringrose*. (3)

(1) 2 B. & S. 456; 31 L. J. (Q.B.) 186. 8 Jur. N.S. 995.
(2) 11 C. B. 176, 190; 20 L. J. (C.P.) 251. 15 Jur. 1177
(3) 6 Exch. 263; 20 L. J. (Ex.) 175.

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May 13. *Mellish, Q.C.* (*Brett, Q.C.*, and *C. Russell*, with him), contrà, was desired by the Court to direct his attention to the arguments by which the sale could be justified. The jury found that the sale of the ship and cargo was under the circumstances justifiable; and there is no objection to the way in which the question was left to them; nor is the rule moved on the ground that the verdict was against the weight of evidence. The only question therefore is, whether or not there was fit evidence to be left to the jury in justification of the sale. The doctrine of *Reimer* v. *Ringrose* (1) and *Rosetto* v. *Gurney* (2) and the cases of that class has no application here, because the cargo at the time of the sale was in the hands of the agent of the assured in safety, and the only matter for consideration was, whether or not it was practicable to forward it to its port of destination so as to be available. It was not enough to shew that expenses would be incurred in forwarding it, without shewing that these would exceed its value on arrival. There was abundant evidence here to go to the jury that it was not possible in a practical sense to send the cargo to England. The dangerous position of the ship, and her crippled condition, combined with the unfavourable period of the year, made it not only justifiable but an absolute duty to sell.

[BLACKBURN, J. If the rule laid down in *Rosetto* v. *Gurney* (2) be the correct one, the proper question was, whether there was evidence which would justify the jury in finding a loss which would account for the difference between the original value of the cargo and the cost of forwarding it to Liverpool, without deducting the bill of lading freight. In considering the right of the master to sell, the original freight is not an element.

SHEE, J. The prudent owner test is not always an accurate one as regards goods.]

The case of *Rosetto* v. *Gurney* (2) has always excited surprise. It is by no means easy to follow the reasoning upon which the judgment professes to be founded.

PER CURIAM. Before proceeding further with the argument, we think Mr. Mellish should have an opportunity of preparing

(1) 6 Exch. 263; 20 L. J. (Ex.) 175.
(2) 11 C. B. 176; 20 L. J. (C.P.) 257.

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himself to meet this new view of the case. We therefore propose to resume it at the sittings after next term.

June 15. *Mellish, Q.C.* In dealing with the case of *Rosetto* v. *Gurney* (1), the difference between the facts of that case and those of the present must not be lost sight of. Here, the ship was in a position of such imminent peril that she might at any moment have been totally lost. All the authorities agree that the true question is, whether it was practicable to forward the cargo to its destination, and that practicable is to be understood in a mercantile sense, viz. so as to be worth more when it arrives than the cost of forwarding it, according to the rule laid down in *Moss* v. *Smith*. (2) In *Rosetto* v. *Gurney* (1), the cargo was in perfect safety in the port of Cork. It was impossible that the freight from Cork to Liverpool of that part of it which was capable of being forwarded, could exceed the freight from Odessa to Liverpool. If therefore the wheat was capable of being sent on, it was capable of earning the original freight; and, if it arrived at Liverpool at all, it would have arrived under the original contract. Here, however, the ship was a complete wreck; and the evidence proved beyond all question that the freight from the place where she lay would have exceeded the original freight from Quebec to Liverpool. It was proved that freights had risen considerably, and that no vessel could have been procured to take the timber on, except at a heavy additional charge. The original freight, therefore, never could be earned, and the contract was at an end. The result was that the owners of the cargo were in possession of it wholly discharged from the original contract to carry. The Chief Justice, in *Rosetto* v. *Gurney* (1), after adverting to the rule laid down in *Moss* v. *Smith* (2), *Parry* v. *Aberdein* (3), and *Roux* v. *Salvador* (4), says: "Applying these few general principles to this case, when the cargo arrived in Cork, it would have been the duty of the master to ascertain whether the cost of unloading the cargo from the original ship, of drying and restoring it, and of transhipping it upon a new bottom, the original ship not being repairable, would, in the aggregate, exceed the value

(1) 17 C. B. 176; 20 L. J. (C.P.) 257.
(2) 9 C. B. 94; 19 L. J. (C.P.) 225.
(3) 9 B. & C. 411.
(4) 3 Bing. N. C. 266; 4 Scott, 1.

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of the restored cargo at its place of destination. If it would, then it would not have been practicable to deliver the cargo in a marketable state at its port of destination. If it would not, then the master could not sell, and the assured could not recover as for a constructive total loss; because it was practicable to deliver the cargo, or part of it, in a marketable state at the port of discharge." Under such circumstances, it may be conceded that the freight from Cork to Liverpool would have nothing to do with the question. The loss would have been an average loss on freight; the master carrying on the cargo under the original contract. The Chief Justice goes on: "It was said in the course of the argument that the cost of carriage from Cork to Liverpool ought also to be taken into consideration, with a view to ascertain if the expense of restoring would exceed the value of the thing restored: and the case of *Reimer* v. *Ringrose* (1) was cited for that proposition. There, the question being whether a cargo of wheat was totally or partially lost, Alderson, B., is reported to have said that 'the real question to be left to the jury ought to have been whether or not the corn was in that state that, if brought home, it could have been sold for an amount exceeding the expense of bringing it home.' We think that is not the correct rule. If the voyage is completed in the original ship, it is completed upon the original contract, and no additional freight is incurred. If the master tranships because the original ship is irreparably damaged,—without considering whether he is *bound* to tranship, or merely *at liberty* to do so,—it is clear that he tranships to earn his full freight; and so the delivery takes place upon the original contract. It may happen that a new bottom can only be obtained at a freight higher than the original rate of freight. It does not seem to have been settled whether, in that case, the ship-owner may charge the cargo with the additional freight. By the French law he may do so; and, as a consequence of that rule, the increased freight would be an average loss, to be added to the other items: see *Shipton* v. *Thornton*. (2) In our opinion, to this extent, and to this extent only, the cost of transit from Cork to Liverpool should be taken into consideration, in ascertaining the practicability of delivering the cargo, or part of it, in a marketable state, at the port of dis-

(1) 6 Exch. 263; 20 L. J. (Ex.) 175. (2) 9 Ad. & E. 314.

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charge." It is extremely difficult to discover what the Court mean by that.

[BLACKBURN, J. They probably meant, that, where the ship-owner was not bound to forward the cargo, and the owner of the cargo elected to do so, freight pro ratâ would be payable, and then the additional freight from the port at which it lay to the port of destination would be an element in considering the practicability of carrying it on.]

With that explanation, that part of the judgment is intelligible. But the Court evidently had not in their minds a case like the present.

[SHEE, J. In *Rosetto* v. *Gurney* (1), the items to be considered in determining the question whether or not it was practicable to carry the cargo on to its place of destination, are said to be "the cost of unshipping the cargo, the cost of drying and warehousing it, the cost of transhipping it into a new bottom, and the cost of the difference of transit, if it can only be effected at a higher than the original rate of freight."

BLACKBURN, J. *Rosetto* v. *Gurney* (1) is cited and approved of in Baily on Perils of the Sea, p. 51, where the matter is fully gone into. The learned author says: "There is a constructive total loss of goods when the goods cannot practically reach their destination, *i.e.* when the expenses resulting from perils of the sea will exceed the probable proceeds of the goods at their port of destination. This is the case when the probable proceeds at the port of destination are less than the expenses rendered necessary by perils of the sea for drying or restoring them sufficiently to allow of their being delivered, and of delivering them at their destination. When the freight payable on the goods under the original bill of lading is not due until they are delivered at their destination, it is the balance only between the expenses above mentioned and the amount of this freight that can be taken into consideration in determining whether there is a constructive total loss; for, to the extent of the original freight, the charge for delivering the goods at their destination is independent of perils of the sea, since to that extent the goods are liable when delivered, whether perils of the sea affect them or not. When, therefore, the original vessel is

(1) 11 C. B. 176, 190; 20 L. J. (C.P.) 257.

totally lost, either actually or constructively, and the expense of restoring the goods sufficiently to allow of their being delivered at their destination under the denomination which they had before they were affected by the perils of the sea, and of delivering them there, do not exceed the probable proceeds of the goods at their destination, added to the original freight, there is no constructive total loss of cargo. When the vessel is not totally lost, and the goods have sustained such injury that they cannot practically be carried on in the same ship, it may be that they can be delivered at their destination by another vessel at an expense which, added to the cost of restoring them sufficiently to allow of their being delivered there, will not exceed their probable proceeds at their port of destination, added to the original freight. In such a case there is no constructive total loss. When those expenses will exceed the probable proceeds, added to the original freight, there is a constructive total loss." It is difficult to find any evidence here to justify the jury in finding a probable loss of cargo to the extent of the 183*l.* plus the bill of lading freight, which is essential to sustain your argument, if *Rosetto* v. *Gurney* (1) be correctly decided.

POLLOCK, C.B., referred to *Cambridge* v. *Anderton.* (2)]

There was strong evidence to shew that it was at the best extremely uncertain whether the cargo could ever be got out at all; and certainly abundant to warrant the jury in finding that it was not practicable to carry it on. The evidence as to the reasonableness of the sale was overwhelming. Then, was a notice of abandonment under the circumstances necessary?

BLACKBURN, J. We propose to take time to consider the question, as it bears upon the rule laid down in *Rosetto* v. *Gurney* (1); and, if necessary, we will hear the argument on the other points, which are of much importance, at the sittings after the next term.

Cur. adv. vult.

Nov. 29. The judgment of the Court (Pollock, C.B., Chan-

(1) 11 C. B. 176; 20 L. J. (C.P.) 257. (2) 2 B. & C. 691; 1 C. & P. 213.

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nell, B., Blackburn and Mellor, JJ., Pigott, B., and Shee, J.) was delivered by

CHANNELL, B. This was an action upon a marine policy of insurance on goods from Quebec to Liverpool. The declaration claimed a total loss. The defendant paid into court as for a partial loss of 23 per cent., and the plaintiffs claimed damages ultra.

From the statement in the case it appears that the vessel with the insured cargo of deal on board was wrecked in the autumn in the river St. Lawrence, that she lay there all the winter, and in the spring was sold by auction, when the hull was bought for 450*l.*, and the cargo for 750*l.*, by the same purchaser.

The purchaser succeeded, without much difficulty or expense, in getting them off together and bringing them safely together to Quebec, where the cargo was sold by him for more than double the price given for it. The purchase of the hull, however, taken by itself, was a losing speculation. There was evidence that the cargo could not have been saved in this manner unless the hull had been purchased also; and that there were some unexpected accidents of weather and tide which facilitated the getting off of the ship and saving of the cargo by the purchaser: and it was contended on behalf of the plaintiffs that the owners of the goods were not bound to purchase the hull, and that the jury should look at the state of the matters as the hull and cargo lay when they were sold; and that the sale was justifiable, if, as matters then stood, it would not have been practicable to save the cargo, and send it on to its destination, without purchasing the hull.

In order to support this view of the case, they gave evidence that the value of the cargo, if it had been sent on and had arrived in Liverpool, would have been 4300*l.*, which, deducting the bill of lading freight of 1556*l.*, would leave a net value of 2744*l.* They also gave in evidence a calculation that, in order to send it on from the place where it lay in peril in the wrecked vessel, it would be necessary to land it, then raft it to a vessel brought down for the purpose, and re-load it as weather permitted; and they made out an estimate of these expenses, as follows:—

	£	s.	d.
The cost of landing it	350	0	0
To raft it to another vessel and re-load it .	700	0	0
Increased freight in addition to the original freight of 1556*l.*, freights having risen between the date of the original shipment and of the opening of the navigation of the river, when another vessel could have been chartered . . .	296	0	0
Additional freight that would have been charged for lying off to take the cargo from where it was stored instead of loading it at Quebec	700	0	0
	£2046	0	0

And evidence was given, that, besides all these, there would probably have been a loss by depreciation, which was variously estimated by the witnesses,—the highest estimate being 12 per cent. on the Liverpool value, or 515*l.*, which if added to the 2046*l.* would bring up the expenditure to 2561*l.*

The plaintiffs also gave evidence that, in the ordinary state of the weather, there would be risk of loss of some portion of the cargo during the operations of landing, rafting, and re-shipping it, and that, if the weather was unfavourable, that risk would be greater.

No notice of abandonment was given.

On this state of the evidence, the judge asked the jury two questions,—first, whether the sale of the ship was justifiable, which the jury answered in the affirmative, and on which finding no question is now raised,—secondly (see paragraph 42 of the case), whether it was right to sell the cargo; directing them, "that whether it was right to sell the cargo or not, would depend on whether the cargo could have been practically carried to its destination, and that he meant the word 'practically' to be understood in its mercantile sense; and that, whether the cargo could be practically carried to its destination would depend, under all the circumstances, on whether the cost of bringing the cargo,

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added to the amount of depreciation, would have left any appreciable margin of profit." The jury answered this question in the affirmative, and the verdict was entered for a total loss, giving leave to the defendant, as is stated in paragraph 43, "to move to enter a verdict for the defendant, or a nonsuit, on the ground that there was no evidence of a total loss, and no evidence of a partial loss exceeding the sum paid into court; or to reduce the damages to the sum actually due as and for a partial loss: and it was at the same time agreed, that, if the Court should be of opinion that the loss was not total, the amount of the partial or average loss should, if necessary, be corrected by the Court, or by an arbitrator to be agreed upon."

A rule was obtained accordingly, which was after argument discharged by the majority of the Court of Common Pleas, my Brother Byles dissenting; from which decision this is an appeal.

The first question, therefore, to be determined, is, whether there was evidence on which the jury might reasonably find that the cargo could not be practically carried on to its destination.

It is to be observed, that, assuming the jury to have believed that the expenses would have been the maximum amount of which there was any evidence, viz. 256*l.*, yet, on the plaintiffs' own figures, there would have been a very considerable margin of profit. The plaintiffs' counsel assumed that this margin of profit was the difference between the Liverpool value of the cargo, *after deducting the original freight*, and the expenses of forwarding it, added to the estimated depreciation,—that is, on their own figures, 183*l.*; and they argued that the jury might reasonably estimate the probable loss of cargo during the operations of landing, rafting, and re-shipping, at an amount which would more than absorb this margin.

By some oversight not explained to us, the defendant's counsel never called the attention of the Court of Common Pleas, nor of the Court of Exchequer Chamber, to the cardinal postulate of the plaintiffs' counsel, that the original bill of lading freight, 155*l.*, was to be deducted. The case was argued in the court below on the assumption that the only question was, whether there was evidence to justify the jury in finding that the probable loss might have been so high as to absorb the 183*l.*; and the judges,

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not having their attention called to the matters which the counsel took for granted, considered it in that way only. The majority of the Court (taking it for granted that this was the proper question) thought that there was evidence on which the jury might find for the plaintiffs to that extent. My Brother Byles thought there was not. In this Court, the argument had proceeded a great way, in the sittings after Easter Term, before it occurred to a member of the court of error as then constituted (1), that we were not considering the right question; for, that, unless the Court of Common Pleas in *Rosetto* v. *Gurney* (2) had laid down a wrong rule, the question was, whether there was evidence that would justify the jury in finding a loss which would account for the difference between the estimated depreciation and the cost of forwarding, and the Liverpool value, *without deducting the original bill of lading freight of* 1556*l.*; and, consequently that the plaintiffs had to shew that there was evidence to justify their finding a probable loss of cargo to the extent of more than 1739*l.*

Mr. Mellish had the opportunity of preparing himself to meet this view of the case; and in the sittings after Trinity Term he was heard at length upon this point before the Lord Chief Baron, my Brothers Blackburn, Mellor, Pigott, Shee, and myself. And we are all of opinion that, where goods are in consequence of the perils insured against lying at a place different from the place of their destination, damaged, but in such a state that they can at some cost be put into a condition to be carried to their destination, the jury are to determine whether it is practically possible to carry them on, that is, according to the well-known exposition in *Moss* v. *Smith* (3), whether to do so will cost more than they are worth; and that, in determining this, the jury should take into account all the extra expenses consequent on the perils of the sea, such as, drying, landing, warehousing, and re-shipping the goods, but that they ought not to take into account the fact that if they are carried on in the original bottom, or by the original ship-owner in a substituted bottom, they will have to pay the freight originally contracted to be paid; that being a charge to which the goods are liable when delivered, whether the

(1) Blackburn, J. (2) 11 C. B. 176; 20 L. J. (C.P.) 257. 15 Jan 1877

(3) 9 C. B. 94; 19 L. J. (C.P.) 225.

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perils of the sea affect them or not. And we also agree that *Rosetto* v. *Gurney* (1) correctly decides that, where the original bottom is disabled by the perils of the seas, so that the ship-owner is not bound to carry the goods on, and he does not choose to do so, the jury are not to take into account the whole of the cost of transit from the place of distress to the place of destination, which must be incurred by the goods owner if he carries them on, but only the excess of that cost above that which would have been incurred if no peril had intervened.

To hold otherwise would be to enable the assured owner of goods to bring into account the whole of the freight whenever the cost of obtaining a substituted bottom exceeded the original freight, however small the excess may be: for, in such a case, the ship-owner would never carry on the goods for the purpose of earning his original freight, though he might, perhaps, do so as agent of the goods owner; whilst no part of the freight could ever be charged when the cost fell short of the original freight, in which case the ship-owner would forward them. This would be a very unsatisfactory state of the law; and we are of opinion that the case of *Rosetto* v. *Gurney* (1), which prevents that result, was correctly decided. Then, applying this to the facts in the present case, it becomes obvious that, whilst it is doubtful whether there was evidence justifying the verdict, if the jury had to deal with a margin of a little more than 5 per cent. of the value of the goods, there is clearly none justifying it when they had to deal with a margin of about 40 per cent.

Mr. Mellish, indeed, said that there are cases in which a thing in extreme and imminent danger of immediate destruction may be justifiably sold, although in the event it turns out that it survives the peril, to the great benefit of the purchaser. But there is not in this case any evidence of such a state of imminent and immediate peril as could justify the verdict for a total loss upon this ground.

We think, therefore, that the rule to set aside the verdict for a total loss must be made absolute.

This renders it unnecessary to consider the question principally argued in the court below, as to the necessity of a notice of

(1) 11 C. B. 176; 20 L. J. (C.P.) 257.

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abandonment. On that point we leave the authority of the decision of the Court below untouched, neither confirmed nor weakened by anything that has taken place in this Court.

On the remaining question, whether the partial loss does or does not exceed the amount paid into Court, we are absolutely without materials for forming a judgment. The only course which seems practicable is that on which the parties seem to have agreed at nisi prius, viz. that an arbitrator should find the figures, and raise and state for the Court of Common Pleas any question of principle involved, arising on his findings.

Rule accordingly.

Attorneys for plaintiffs: *Waltons & Bubb.*
Attorneys for defendant: *Field & Roscoe.*

END OF MICHAELMAS TERM.

CASES

DETERMINED BY THE

COURT OF COMMON PLEAS

AND BY THE

COURT OF EXCHEQUER CHAMBER,

ON ERROR AND APPEAL FROM THE COURT OF COMMON PLEAS,

IN AND AFTER

HILARY TERM, XXX VICTORIA.

1867
Jan. 12.

CHAPMAN *v.* SHEPHERD.
WHITEHEAD AND OTHERS *v.* IZOD.

Companies Act, 1862 (25 & 26 *Vict. c.* 89); *Construction of s.* 153—*Contract for Purchase of Shares before Petition for winding up—Rules of Stock Exchange.*

A contract for the purchase of shares in a joint stock company, entered into but not completed by transfer before the presentation of a petition for winding up the company under the Companies Act, 1862 (25 & 26 Vict. c. 89), is not rendered void by the 153rd section of that act.

A broker who has bought shares for a customer under such circumstances, and who has in accordance with the rules and regulations of the Stock Exchange been compelled to pay the price of them to the person from whom he bought, is entitled to recover back from his principal the money so paid.

CHAPMAN *v.* SHEPHERD.

DECLARATION for money paid, work and labour, and upon accounts stated. Plea, never indebted.

The facts which appeared in evidence at the trial before Byles, J., at the sittings in London after last Trinity Term, were these:—The plaintiff, a stock and share broker at Nottingham (not a member of the London Stock Exchange), was, in April, 1866,

instructed by the defendant to buy on his account shares in "Overend, Gurney, & Co., Limited." The plaintiff accordingly bought the shares through Messrs. Carruthers & Scott, brokers in London, and members of the London Stock Exchange, and the account of the purchase was sent by Carruthers & Scott to the defendant. The shares not being saleable at the price reserved by the defendant, the transaction was carried over two or three settling-days (the differences being paid by Carruthers & Scott), and ultimately to the 15th of May. On the 10th of May, Overend, Gurney, & Co. suspended payment; and on the 11th a petition for winding up the company under the Companies Act, 1862 (25 & 26 Vict. c. 89), was presented. No order, however, was made upon that petition until the 22nd of June.

Messrs. Carruthers & Scott were compelled, according to the rules and regulations of the Stock Exchange, to pay the price of the shares to the person from whom they had bought them; and the plaintiff, having on the 18th of May repaid them the amount, brought this action to recover the money so paid.

On the part of the defendant it was objected,—first, that the action should have been brought by Carruthers & Scott, and not by the now plaintiff,—secondly, that the 153rd section of the Companies Act, 1862, rendered all dealings and transactions with shares in a company after a petition for winding up absolutely void, and so there could be no valid transfer of the shares to him, at all events without the order of the Court, which had not been obtained.

The learned judge, reserving the defendant leave to move, directed a verdict to be entered for the plaintiff for the amount claimed.

Nov. 2, 1866. *Griffits* accordingly obtained a rule nisi to enter a verdict for the defendant, on the ground that there was no evidence to shew any authority in the plaintiff to pay the money sued for after a petition for winding up had been presented against Overend, Gurney, & Co., Limited, the money having been paid for shares in that company, and the 153rd section of the Companies Act, 1862, rendering a transfer of shares after a petition for winding up has been presented, void. He also moved on the ground that

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the action should have been brought by Carruthers & Scott, and not by the now plaintiff: but the Court refused a rule on that point, holding that Carruthers & Scott were not parties to the contract in question.

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The first count of the declaration stated that the plaintiffs, being share and stock brokers carrying on their business in the buying and selling as such brokers on the London Stock Exchange of stocks and shares in public companies and undertakings, and being bound by the rules and practice of the Stock Exchange, the defendant, knowing the premises, employed the plaintiffs, as and being such brokers, to purchase for the defendant, according to the rules and practice of the Stock Exchange, twenty-five shares in a certain company called or known as Overend, Gurney, & Co., Limited, at the price of 4*l.* per share discount from the sum paid upon and in respect of each such share; and the plaintiffs accepted such employment and accordingly bought for the defendant, from a broker on the Stock Exchange, twenty-five shares in the said company at 5*l.* discount; and the plaintiffs, according to the rules and practice of the Stock Exchange, thereupon became and were liable to the selling broker from whom the plaintiffs so purchased the shares, for the carrying out of the contract of purchase, and for the payment for the shares upon the settlement-day fixed and appointed in due course for the settlement of the said contract and other the contracts made for the sale or purchase of stock or shares upon the Stock Exchange; and all things happened, and all times elapsed, &c. &c. necessary to entitle the selling broker to be paid by the plaintiffs, as the buying brokers, the price of the said twenty-five shares in the said company, and the plaintiffs accordingly paid the price aforesaid for the said shares to the said selling broker, to wit, the sum of 275*l.*, and likewise necessarily and according to the said rules and practice paid for the defendant certain moneys, to wit, the sum of 1*l.* 10*s.*, for stamps and fees in respect of the said contract of purchase; and all things happened, and all times elapsed, &c. &c. necessary to entitle the plaintiffs to be repaid by the defendant the said sums of 275*l.*,

and 1*l.* 10*s.* respectively, and nothing happened or was done to disentitle the plaintiffs thereto; yet the defendant had not paid the said sums respectively, or either of them.

There was also a count for money paid by the plaintiffs for the defendant at his request, and for work done, services rendered, commission earned, and money expended by the plaintiffs as stock and share brokers for the defendant at his request, in and about the purchase by the plaintiffs for the defendant at his request of certain shares; for interest; and upon accounts stated.

Pleas,—first, to the first count, that the defendant did not employ the plaintiffs to purchase the said shares, nor did the plaintiffs accept such employment or buy the shares, as alleged.

Thirdly, as to so much of the causes of action in the first count declared upon as relate to the sum of 275*l.*, and as to so much of the claim of the plaintiffs under the common counts as relates to money paid by the plaintiffs for the defendant at his request,—that such request was not a request expressly made by the defendant, but was only such a request as was or would be implied in law from the fact of the defendant's having employed the plaintiffs for the purpose in the first count mentioned, knowing the premises therein in that behalf mentioned; that the said company or undertaking therein mentioned was and is a company constituted and incorporated under and bound by and subject to all the enactments and provisions contained in the Companies Act, 1862; that the shares in the said company so alleged to have been bought by the plaintiffs were so bought by the plaintiffs, and were sold by the selling broker, upon the terms (amongst others) that the same were to be paid for by the plaintiffs as purchasing brokers at a then future day fixed and appointed for that purpose as the settlement-day; that, in and by certain rules and practice of the Stock Exchange by which such purchase and sale of shares as in the first count mentioned were at the time of such purchase and sale governed and regulated, the selling broker was on the said settlement-day, concurrently with the payment of the said price by the purchasing broker, bound to deliver to the purchasing broker a good and valid transfer of the said shares so purporting to have been bought and sold, to be held by the said purchasing broker for and on behalf of his principal; that, after the alleged pur-

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chase and sale, and before the settlement-day in the first count mentioned, and before the plaintiffs paid the price as alleged to the selling brokers, the said company was begun to be and was being wound up by the Court in the said act in that behalf mentioned, under the provisions of the said act, of which the plaintiffs had at the time of paying the said price as alleged full notice and knowledge; and that the selling broker did not concurrently with the payment of the said price deliver to the plaintiffs as and being such purchasing brokers, nor at any time since, a good or valid transfer of the shares in the first count mentioned, to be held by them for the defendant, nor had any order of the Court in the said act in that behalf mentioned ever been obtained for the making of any transfer of the said shares to the defendant, nor had the plaintiffs ever tendered to the defendant, nor been ready or willing to deliver to him, any such good or valid transfer of the said shares; wherefore the defendant committed the breach in the first count mentioned, and had not repaid the plaintiffs the moneys so by them alleged to have been paid at the defendant's request.

Fourthly, to the common counts, never indebted.

The plaintiffs joined issue on these pleas; and, for a further replication to the third plea, said that, before action, and concurrently with the payment of the said price and moneys in the third plea mentioned by the plaintiffs to the selling broker, the selling broker in due course delivered to the plaintiffs, as such buying brokers for the defendant, a deed of transfer of the said shares in proper form from, and duly executed by, the principal of the said selling broker and owner of the shares so sold, to the defendant as the buyer thereof, and at the time duly delivered to the plaintiffs as such buying brokers the scrip or certificates of and representing the said shares so sold; and the said selling broker therein and thereby did all things which by the rules and practice of the said Stock Exchange he was bound to do to entitle him to be paid the said price as aforesaid by the plaintiffs as such buying brokers, and nothing had happened or was done to disentitle him thereto; that the plaintiffs as such buying brokers had at the time of such payment become and they were bound to pay the said selling broker, according to the said rules and practice of

the Stock Exchange in that behalf, and they paid such selling broker accordingly; and that before action the defendant absolutely refused to carry out the said contract of sale to him of the said shares, and thereby it became and was impossible further to proceed with the completion thereof, and with any further or other transference of the said shares.

The defendant took issue on the replication to the third plea; and for a second rejoinder thereto said, that the principal and owner of the shares therein mentioned executed the deed of transfer, and the selling broker therein mentioned delivered the same and the same scrip and certificates to the plaintiffs, and the plaintiffs paid the said selling broker, and the defendant refused to carry out the contract of sale to him, after but not before the said company was begun to be and was being wound up, as in the third plea mentioned.

The defendant also demurred to the replication to the third plea, the grounds stated in the margin being, "that the transfer of the shares was prohibited by the 153rd section of the Companies Act, 1862 (25 & 26 Vict. c. 89), and void under that section; and that no facts are averred which shew that the plaintiffs are entitled to recover from the defendant the money alleged to have been paid by them on such void transfer." Joinder.

The plaintiffs joined issue on the second rejoinder, and also demurred thereto, the grounds of demurrer alleged being, "that a winding-up within the meaning of the 153rd section of the Companies Act, 1862, does not render void *contracts* to transfer; and that, the plaintiffs having been bound by the Stock Exchange rules to pay the price, &c., of the shares duly bought by them for the defendant, and having paid accordingly, it is no answer to their claim for repayment that a winding-up proceeding subsequent to the contract of sale has rendered a complete legal transfer of the shares impossible, without the leave of the Court." Joinder.

At the trial before Willes, J., at the last summer assizes at Guildford, the facts were these:—The defendant, a merchant at Birmingham, had (as the jury found) authorized one Harding, a stock and share broker at Birmingham, to purchase for him twenty-five shares in "Overend, Gurney, & Co., Limited," provided they

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could be procured at 4 discount; and Harding, by telegram, on the 10th of May, 1866, instructed the plaintiffs, stock and share brokers in London, and members of the London Stock Exchange, to buy them for him. The plaintiffs, accordingly, on the same day bought for the defendant twenty-five shares at 5 discount, for the next settling-day, viz. the 15th of May. On the 10th of May, Overend, Gurney, & Co., suspended payment, and on the 11th a petition for winding up was presented by the directors of the company to the Master of the Rolls. This petition was by an order of the 28th of May transferred to Kindersley, V.C., and on the 22nd of June an order for the voluntary winding up of the company under the superintendence of the Court was made; and the company is now in course of being wound up thereunder.

On the part of the defendant it was submitted that all dealings in shares after a petition for winding up being declared void by the 153rd section of the Companies Act, 1862, 25 & 26 Vict. c. 89, the defendant was not bound to accept a transfer of the shares.

A verdict was, by the direction of the learned judge, entered for the plaintiffs for the amount claimed, leave being reserved to the defendant to move to enter the verdict for him.

Nov. 3, 1866. *C. Pollock, Q.C.*, obtained a rule nisi accordingly, on the grounds,—first, that the plaintiffs were not bound to pay the money sued for; secondly, that the contract for the sale of the shares was invalidated by the winding up under the Companies Act, 1862; thirdly, that the rules of the Stock Exchange are controlled by that act.

The Court directed that the two rules, and also the demurrers in *Whitehead* v. *Izod*, should be argued together.

Jan. 12. *Field, Q.C.*, shewed cause against the rule in *Chapman* v. *Shepherd*. The defendant contends that the effect of the 153rd section of the 25 & 26 Vict. c. 89, is, to free him from the obligation to perform his contract. That section enacts that, "where any company is being wound up by the Court, or subject to the supervision of the Court, all dispositions of the property, effects, and things in action of the company, and every transfer of shares,

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or alteration in the status of the members of the company, made between the commencement of the winding up and the order for winding up, shall, unless the Court otherwise order, be void." By the interpretation clause, s. 84, it is provided that "a winding up of a company by the Court shall be deemed to commence at the time of the presentation of the petition for the winding up." The question in this case does not arise as between the buyer and the seller of the shares: it is an action brought by an agent employed to buy shares, and his principal: and the only question is, whether the agent has paid the price of the shares in the proper performance of his duty; for, if he has, he is clearly entitled to recover from his principal the money so paid: *Taylor* v. *Stray* (1); *Stray* v. *Russell*. (2) In the last-mentioned case, it was provided by the rules of the company whose shares were the subject of purchase and sale, that transfers could only be made with the consent of the directors: and Williams, J., delivering the judgment of the Exchequer Chamber, said: "We all think that, construing the contract in this case by the usage of the Stock Exchange, subject to which it was made, there was no undertaking by the vendor of the shares to obtain absolutely the consent of the directors to the transfer. At the most, his contract was, to obtain it only after the vendee had done what was reasonable towards obtaining it in the usual course." So, here, if an order of the Court of Chancery was necessary for the purpose of rendering the transfer valid, the defendant should have obtained it.

Harington, in support of the rule. The payment made by the plaintiff for these shares after the commencement of the winding up of the company was a payment in his own wrong. That which was handed to him on the 18th of May was not a transfer: it was, by virtue of the 153rd section of the Companies Act, 1862, mere waste-paper. The cases cited have no application. In *Stray* v. *Russell* (2) the company's deed rendered the consent of the directors to a transfer of shares necessary; and it was obviously the duty of the purchaser to do all such acts as were required to put him upon the register. But by the 153rd section of the Com-

(1) 2 C. B. (N.S.) 175, 197; 26 L. J. (C.P.) 185, 287. 3 Jur. N.S. 520. 964.

(2) 1 E. & E. 888, 916; 28 L. J. (Q.B.) 279; 29 L. J. (Q.B.) 115. 6 Jur. N.S. 168.

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panies Act, 1862, the transfer is a void transfer until the Court otherwise order. The directors might waive the strict performance of the condition; but there can be no waiver here. The transfer, therefore, by the operation of the statute, which must be taken to override the rules of the Stock Exchange, is altogether void.

[WILLES, J. If the buying brokers had not paid the money, they would have rendered themselves liable to be expelled the Stock Exchange.]

The 153rd section of the Companies Act, 1862, must receive its legitimate construction, quite irrespective of the rules of a voluntary association.

Sir G. Honyman, Q.C., and *Archibald*, appeared to shew cause in *Whitehead* v. *Izod;* but the Court called on

C. Pollock, Q.C., and *Beresford*, to support the rule. The effect of the 153rd section of the Companies Act, 1862, is, to put a stop for all purposes to all dealings in shares in public companies between the commencement of the winding up and the order for winding up, except subject to the leave of the Court of Chancery. It is an absolute prohibition. In the case of a deed of settlement of a company which provides that no person shall be on the register of shareholders without the consent of the directors, every one who purchases shares buys them subject to that regulation. The Courts of Equity have uniformly refused to interfere with the register after a petition for winding up: *In re Joint Stock Discount Company, Shepherd's Case* (1); *In re English Joint Stock Bank, Marzetti's Case* (2); *In re London, Hamburg, and Continental Exchange Bank, Emmerson's Case* (3), the Lords Justices held that they had a discretion to make valid any dealings with shares between the presentation of a petition for a winding up and the order made upon it; but that an agreement for the sale of shares in a company, entered into in ignorance that a petition for winding up the company had been presented, was not enforceable or valid.

[MONTAGUE SMITH, J. This was not a dealing with shares, but a payment made by the brokers in consequence of a previous

(1) Law Rep. 2 Eq. 564. (2) 1 W. Notes, 399.
(3) Law Rep. 1 Ch. App. 433.

liability. The contract was made before the commencement of the winding up. The rules and regulations of the Stock Exchange, by which all persons dealing in stocks and shares are bound, rendered it compulsory on the plaintiffs to pay the money upon the transfer and share certificates being tendered to them.]

The rules of the Stock Exchange cannot prevail against the direct enactment of a statute. In *Jones* v. *How* (1), A., upon the marriage of B., his daughter, covenanted with her husband, C., his executors, &c., by deed or will to give, leave, and bequeath unto B. one full equal eighth part or share (that being an equal share with his other children) of all the real and personal estate of which he should die seised or possessed. B. died in the life-time of A. A. having in his life-time made some disposition of property in favour of a son, by will devised and bequeathed his real and personal estate for the benefit of his widow and some of his surviving daughters; and it was held by this Court that C. had not any cause of action against the executors of A. There, there was an ademption of the subject-matter of the covenant before the time for performance had arrived. So, in the case of a contract to load a cargo at a foreign port which is afterwards blockaded, it has been held both here and in the American courts, that, inasmuch as the contract cannot legally be performed, the contracting party is not bound to perform it at all. In *Taylor* v. *Stray* (2), it was assumed by the whole Court that no change had taken place in the subject-matter of the contract. This statute, upon grounds of public policy, creates a system of its own.

BOVILL, C.J. I am of opinion that these rules should be discharged. The plaintiffs in each case were employed by the defendant to purchase for him shares in a company called Overend, Gurney, & Co., Limited, and in a certain event to pay the price of them on his account; the contract-note in each case shewing that the contract was made subject to the rules and regulations of the London Stock Exchange. Both parties, therefore, are bound by those rules; and, if nothing more had occurred, the plaintiffs

(1) 9 C. B. 1. See the observations of Wigram, V. C., upon this decision, in 7 Hare, 267.

(2) 2 C. B. (N.S.) 175, 197; 26 L. J. (C. P.) 185, 287.

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would have been bound to pay the money to the persons of whom they purchased the shares; and the defendant, having employed the brokers to make the purchase, would be equally bound to reimburse the plaintiffs. But it is contended in support of the rules, that the effect of the 153rd section of the Companies Act, 1862, is, to render transfers of shares in public companies made between the commencement of the winding up and the order for winding up absolutely illegal and mere waste-paper. Several cases were cited; amongst them was *Emmerson's Case.* (1) That shews that the transfers are not illegal and void, but that it is in the discretion of the Court of Chancery to allow them to operate as transfers. Many cases may be imagined in which the transfer of shares after the commencement of a winding up may be valid. Take the case of a transfer of shares where all the calls had been made, and the company is compelled to wind up in consequence of its assets being abroad, and not presently available, and the purchaser choosing to take the chance of profit being ultimately realized. In such a case the transfer might be available; and it would be matter for the discretion of the Court. Both parties to this contract knew that the company was liable to be wound up, and must be taken to have been cognizant of the rules of the Stock Exchange. The 153rd section of the statute was not intended to repeal those rules or to alter contracts. The cases of *Taylor* v. *Stray* (2) and *Stray* v. *Russell* (3) appear to me conclusively to shew that the plaintiffs in both these cases are entitled to recover.

WILLES, J. I am of the same opinion. The plaintiffs having done everything that they were bound to do, having purchased the shares in obedience to the instructions of their principals, and having been compelled by virtue of the rules and regulations of the Stock Exchange to pay the price to the persons from whom they bought them, seek to be reimbursed the moneys they so paid; and they are met by an objection that the whole transaction was rendered void by the 153rd section of the Companies Act, 1862,

(1) Law Rep. 1 Ch. App. 433.
(2) 2 C. B. (N.S.) 175, 197; 26 L. J. (C.P.) 185, 287.
(3) 1 E. & E. 888, 916; 28 L. J. (Q.B.) 279; 29 L. J. (Q.B.) 115.

and consequently that they, having notice of that fact, ought not to have made the payments. If the act of parliament had annulled the transaction, it might have been necessary to consider whether the practice of brokers on the Stock Exchange could make any difference. Now, it is familiar law that a principal who employs an agent to purchase goods for him in a particular market, is to be taken to be cognizant of and is bound by the rules which regulate dealings therein; and the agent is entitled to be indemnified by his principal for all he does in accordance with those rules. Here, however, we must first inquire whether the foundation of the argument has any validity, whether the 153rd section of the statute did avoid the contract. I think it did not. The test is obvious; and that is, whether the buyer could have insisted upon receiving the transfers and certificates under the circumstances which have occurred. It is clear that he could, because he was at liberty to make an application to the Court of Chancery that he might be declared a shareholder in the company. It would seem to require little or no argument to establish that a person who has a right to enforce a contract though conditional, ought not to be heard to say that the contract is void, before he has taken the step which is required in order to ascertain whether it is void or not. Now, at the times when the payments in question were made, the contracts had not been ascertained to be void. The agent was, I think, clearly entitled in each case to be reimbursed by his principal. If it were necessary to consider the matter, I must own I cannot conceive that there is any injustice in the regulation of the Stock Exchange which makes the buying broker responsible personally for the price of the stock or shares. A broker, however, who receives only a small commission on the purchase, should not in fairness be subjected to such a risk as that which is sought to be cast upon him in this case.

KEATING, J. I am quite of the same opinion. Mr. Pollock was compelled to argue that the effect of the 153rd section of the Companies Act, 1862, was to abrogate the rules of the Stock Exchange. I cannot think the legislature contemplated any such consequence, or intended in any way to affect contracts. The plaintiffs were employed as agents, and in the course of that

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employment it became their duty to pay money on account of their principals. It would be a strong thing to allow this provision in the statute to be set up as an answer to the claim of the agents to be reimbursed. Suppose the defendants had proceeded against the plaintiffs for not performing their duty according to their employment, could the latter have set up the 153rd section as an answer? Clearly not. Under all the circumstances, I think the verdict in each of these cases ought to stand.

MONTAGUE SMITH, J. I am of the same opinion. The liability of the defendants to re-pay the plaintiffs the moneys which they have paid on their account springs from the nature of the original employment. The plaintiffs as brokers were employed to buy shares in a joint-stock company. It was an implied condition of that employment that the defendants should be bound by the rules and regulations which bind all persons dealing on the Stock Exchange. Mr. Pollock in the one case, and Mr. Harington in the other, have contended that the plaintiffs were not bound to pay for the shares, because the effect of the 153rd section of the Companies Act, 1862, was to declare the contract void, and to annul the rule of the Stock Exchange, which rendered the payment obligatory on the plaintiffs under pain of expulsion. The case before the Lords Justices, however, is a strong authority to shew that there is no foundation for that argument. Lord Justice Turner there says: "This section plainly refers to the 84th section, and in terms refers to transfers of shares, and to alterations in the status of members of the company; and, having regard to the fact that the rights between the company and the shareholders must, to some extent at least, involve the rights between the shareholders and other persons, I do not see how it can well be said that the discretion given by the section was not intended to be given with reference to these latter rights. Such a construction of the section would obviously be most inconvenient, and might lead to great injustice, as it would make the section operate so as necessarily to invalidate all transactions between shareholders and other persons, although they may have been perfectly fair and bonâ fide." Upon the reason of the thing, therefore, as well as upon

(1) Emmerson's Case, 1 Ch. App. 435.

authority, I am of opinion that the plaintiffs are entitled to recover.

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Rules discharged.

Sir G. Honyman, Q.C., prayed judgment for the plaintiffs upon the demurrers in *Whitehead* v. *Izod*.

Judgment for the plaintiffs.

Attorneys for plaintiff in *Chapman* v. *Shepherd*: *Field & Roscoe, for Thorpe & Thorpe, Nottingham.*

Attorneys for defendant: *Hollings, Sharpe, & Ullithorne.*

Attorneys for plaintiffs in *Whitehead* v. *Izod*: *Flux & Argles.*

Attorneys for defendant: *Bird & Moore.*

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Jan. 23.

Married Woman—Discharge from Custody on a ca. sa.—Issue on Plea of Coverture found for Plaintiff.

A married woman sued as a feme sole pleaded her coverture, and, no evidence being offered at the trial in support of the plea, a verdict was found against her, and she was afterwards arrested on a ca. sa.:—

Held, that she was not entitled to her discharge.

THE defendant, being sued as a feme sole in an action for goods sold and delivered, pleaded coverture, and, no evidence being offered at the trial in support of the plea, a verdict was found against her.

Having been arrested under a ca. sa. issued upon the judgment, she applied by summons for her discharge from the custody of the sheriff, on the ground that she was a married woman at the time of the accruing of the plaintiff's claim; and Byles, J., on the 19th instant, made an order accordingly.

Jan. 21. *H. James* obtained a rule nisi to rescind the order, and it was ordered by the rule that the defendant should remain in the custody of the sheriff under the ca. sa. until cause was shewn.

Jan. 23. *Pearce* shewed cause, upon an affidavit of the defendant, who described herself as Flora Newington, the wife of W. J. Newington, of Ticehurst, in the county of Sussex, in which she

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stated that at the time of contracting the debt for which the action was brought she was the wife of Newington, who is still living; that her husband and herself had not lived together for seven years last past, and that during that period she had received no allowance or maintenance from him; that, on the 2nd instant, she was arrested at the suit of one Markwell, and also at the suit of one Dulin, and that on the 7th Keating, J., ordered her discharge on the ground of her being a married woman; and that she was detained at the suit of the now plaintiff upon a detainer which was discovered upon a search at the sheriff's office after the order for her discharge in those two actions. A married woman who is taken in execution in an action against the husband and wife, is as a matter of right entitled to be discharged out of custody, unless it be shewn that she has at her command separate property which can at the time be applied to the payment of the debt: *Edwards and Wife* v. *Martyn* (1); *Ivens* v. *Butler and Wife.* (2) Lord Campbell, in the last-mentioned case, says: "The Court of Exchequer has said (3) that she is entitled to be discharged only when taken with her husband. I cannot accede to that doctrine, because it seems to me to be quite immaterial whether both are taken or only the wife."

[WILLES, J. In *Beynon* v. *Jones* (4), where the action had been commenced against a feme sole, who married during the pendency of it, and the plaintiff obtained judgment against her in her name when sole, and she had been taken under a ca. sa. sued out upon such judgment, the Court of Exchequer refused to discharge her out of custody on the ground that she had no separate property.]

The true principle is that laid down by the Court of Queen's Bench in *Ivens* v. *Butler and Wife.* (2)

[BOVILL, C.J. Here the defendant is sued as a feme sole: she has pleaded her coverture; and the issue has been found against her.]

She ought not to be deprived of her common-law right merely because by some inadvertence she was not prepared at the trial to prove her plea. The certificate of her marriage is annexed to her

(1) 17 Q. B. 693; 21 L. J. (Q.B.) 86.
(2) 26 L. J. (Q.B.) 145.
(3) In *Larkin* v. *Marshall*, 4 Ex. 804.
(4) 15 M. & W. 566.

affidavit; and there is also the affidavit of one who was witness to the marriage.

[WILLES, J. Since the 1 & 2 Vict. c. 110, s. 101, there has been no difficulty in obtaining the discharge of a married woman, without having recourse to this summary proceeding. In *Moses* v. *Richardson* (1), the defendant, a married woman at the time when the action was brought, being sued as a feme sole, had suffered judgment to go by default, and had been taken in execution: and, upon a motion to discharge her, Lord Tenterden said: "The defendant ought not to have suffered the plaintiff to incur the expense of executing a writ of inquiry. She must be left to her writ of error."]

H. James was not called upon to support the rule.

BOVILL, C.J. Upon the facts now presented to us, and which were not before my Brother Keating or my Brother Byles, it appears to me that there is no ground for the discharge of the defendant, and that the rule to rescind my Brother Byles's order should consequently be made absolute. The action was brought against the defendant as a feme sole. She pleaded her coverture; and the issue on that plea has been found against her. Under these circumstances, I am of opinion that we ought not to discharge her.

WILLES, J. I am of the same opinion. If the defendant has any remedy, it is that pointed out by Lord Tenterden in *Moses* v. *Richardson*. (1) I do not say that it is not within the discretion of the Court to do that compendiously which might be done by the course suggested, in the same way as they will set aside an outlawry upon the terms of payment of all the costs which the plaintiff has been put to by the proceedings. This, however, is not an application to the equitable discretion of the Court: it is an absolute claim by the defendant as matter of right to be discharged as a married woman. There is no case where that has been allowed, except where she has been sued with her husband. I do not say the Court could not do so if a proper case for the exercise of the power were presented to them. But there is no authority for

(1) 8 B. & C. 421.

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extending it to the case of one sued as a feme sole suffering judgment by default, or to the case of a married woman who has pleaded her coverture, and has allowed the verdict to go against her on the trial of that issue, and so has created a sort of estoppel of the advantage of which it would be unjust to deprive the creditor, without at least indemnifying him against the costs which he has been unnecessarily put to. I see no reason in this case for creating a precedent.

KEATING, J. I am of the same opinion. This is an application for the discharge of the defendant from custody under an execution in an action in which she, being sued as a feme sole, has pleaded her coverture, and has had the plea found against her. She comes to ask for her discharge on the ground that she is that which by the judgment of the Court she is pronounced not to be.

MONTAGUE SMITH, J., concurred.

Rule absolute.

Attorneys for plaintiff: *Francis & Bosanquet.*
Attorney for defendant: *W. E. Goatly.*

Jan. 23.

EX PARTE DARVILLE.

Attorney—Articles of Clerkship—Inrolment nunc pro tunc.

10 C.P. 641, 2

The Court will only permit articles of clerkship to be inrolled nunc pro tunc, and the service thereunder to be computed from the date of their execution (the duty and penalty under 19 & 20 Vict. c. 81, s. 3, being paid), where the omission to stamp them at the proper time has been the result of some accident or unforeseen circumstance. The mere disappointment of some vague hope or expectation of obtaining the means of paying the duty in time will not be received as an excuse for a non-compliance with the statute.

Garth, Q.C. (*Morgan Howard* with him), moved that the applicant, Thomas Henry Darville, be at liberty to inrol the articles of clerkship entered into between Mr. W. H. Barber and himself, bearing date the 27th of October, 1856, nunc pro tunc, and that the service of the applicant thereunder be computed from the date of the execution of the articles.

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The affidavit of Mr. Darville was in substance as follows:—That in 1842 he became clerk to one Bedford, an attorney; that, in April, 1856, he became managing-clerk to Mr. Barber; that, on the 27th of October, 1856, he entered into articles of clerkship with Barber for five years, and duly served him during that term; that, prior to his entering into the articles, his wife's mother had taken proceedings in Chancery against the executors and trustees of her grandfather's will, which, if successful, would have placed about 500*l.* at his mother-in-law's disposal, out of which she promised to give him, in consideration of services he had rendered her, a sum of 100*l.*, to enable him to stamp his articles, but that, the suit terminating adversely, he failed to obtain the 100*l.*, and was in consequence unable during the first six months after the execution of the articles to pay the stamp-duty of 80*l.* thereon; that he then arranged with Barber to pay the duty out of the salary of 250*l.* per annum which Barber had engaged to allow him, but that, although Barber had retained more than sufficient of the salary to do so, and had been repeatedly urged to perform his promise, he neglected to do so, and the articles expired without having been stamped; that, at the expiration of the five years, Barber was indebted to him in the sum of 150*l.*, which is still unpaid, Barber having, in October, 1862, left London, in difficulties; that from February, 1862, when he left Barber's service, he had been employed by several attorneys, whose names were mentioned, in the capacity of managing-clerk, but that, in consequence of his having to contribute to the support of his own and his wife's relatives, he had been unable until the present time to obtain the necessary means for stamping his articles and paying the penalty; that the omission to stamp the articles arose under the circumstances before stated, the applicant fully believing that within the first six months of the term he should have obtained the means for so doing from his mother-in-law, and thereafter that Barber would have performed his promise; that he had been in the uninterrupted practice of the profession for twenty-four years, for sixteen of which he had acted as managing-clerk; that he had obtained the permission of the Lords of the Treasury to stamp the articles on payment of the duty (80*l.*) and a penalty of 50*l.*, which sums he had paid on the 18th instant, and the articles were then duly

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stamped; that he had filed with the proper officer of the Court an affidavit of the due execution of the articles; and that he did not enter into the articles, or refrain from stamping them at the proper time, with any fraudulent design, or as a mere matter of speculation, but in perfect good faith, and with the full intention of paying, and a full and confident belief and expectation of being able to pay the duty within the proper time. There were also affidavits by the several attorneys whom the applicant had served, all bearing the strongest testimony as to his integrity and skill in his profession.

It was contended that the affidavit of Mr. Darville sufficiently disclosed such a disappointment of just and reasonable expectations as to bring his case within the principle of the decisions in *Ex parte Bishop* (1), *Ex parte Breden* (2), and *Ex parte Jones*. (3)

16 C.B. 663.

BOVILL, C.J. The affidavit of Mr. Darville satisfies my mind that there was a bonâ fide intention on his part when he entered into the articles with Mr. Barber that the stamp-duty should be paid within the proper period; and that that intention was frustrated by circumstances which he could not at the time foresee or control. Whether or not the fact of his having relied on the chance of obtaining the money from the result of the Chancery suit referred to, would have been sufficient of itself to warrant us in granting this application, it is unnecessary to say. But it appears that this gentleman had made an arrangement with Barber under which a portion of his salary was retained by that person to pay the stamp-duty, and that, when Barber left London in 1862,—up to which time Mr. Darville continued in his service,—there were ample funds for that purpose in his hands belonging to Mr. Darville. The testimonials which have been furnished by several attorneys of the highest respectability, as to his qualifications and his conduct whilst in their respective services, are also well worthy of attention. All the circumstances considered, I think Mr. Darville has abundantly shewn that he had a bonâ fide intention to comply with all the requirements of the statute, and did not rashly specu-

(1) 9 C. B. (N.S.) 150; 30 L. J. (C.P.) 48. 7 Jur. (N.S.) 243.
(2) 12 C. B. (N.S.) 351; 31 L. J. (C.P.) 321. 8 Jur. (N.S.) 937
(3) 14 C. B. (N.S.) 301.

late or mean to delay the payment of the duty, and that there was that sort of emergency and failure of just and reasonable expectations which fairly bring him within the rule which the Court has usually acted upon in these cases. I therefore think that Mr. Darville's service under the articles should at all events be allowed to be computed from the time when sufficient money belonging to him was actually in the hands of Barber.

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Ex parte Darville.

WILLES, BYLES, and KEATING, JJ., concurred.

Rule granted.

Attorney for applicant: *J. R. L. Walmisley.*

DERBY *v.* HUMBER.

Jan. 28.

Construction—Apprenticeship Deed—Compliance with Condition.

A deed of apprenticeship contained a provision that, in the event of the failure of the health of the apprentice, so as to incapacitate him from following the profession of a civil engineer, before the 1st of April, 1866, the master should refund to the father 50*l.* of the premium; it being agreed that the production at any time before that day of a certificate signed by two duly-qualified medical men, testifying as to the fact, should be conclusive evidence that the health of the apprentice had failed, so as to incapacitate him from following his profession. The health of the apprentice failed, and he died on the 4th of August, 1865. On the 28th of March, 1866, the defendant (the master) was served with a certificate in the terms of the condition, dated the 24th of March, but referring to the state of health of the apprentice in June, 1865:—

Held, that the certificate was a sufficient compliance with the condition to entitle the father to recover the 50*l.*

THE following case was stated by the judge of the Westminster county-court, for the opinion of this Court:—

1. This was an action brought to recover the sum of 50*l.*, alleged to be due to the plaintiff from the defendant, a civil engineer, under a covenant in an indenture of apprenticeship made the 6th of May, 1865, between the defendant of the one part and the plaintiff and James Derby (son of the plaintiff) of the other part, whereby James Derby was apprenticed to the defendant as clerk, to be instructed in the practice and profession of a civil engineer for three years from the 1st of April, 1865.

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2. The indenture contained the following covenant:—"And the said William Humber (the defendant) further agrees, that, in the event of the health of the said James Derby failing, so as to incapacitate him from following the said profession of a civil engineer, before the 1st of April, 1866, he the said W. Humber will refund and pay over to the said J. T. Derby (the plaintiff) the sum of 50*l.*; in such case the indentures to become cancelled and null and void as and between the said parties; it being understood and agreed between the parties hereto that the production by the said J. T. Derby, his executors or administrators, to the said W. Humber, at any time before the said 1st of April, 1866, of a certificate signed by two duly-qualified medical gentlemen, testifying as to the fact, shall be conclusive evidence that the health of the said James Derby has failed, so as to incapacitate him from following the said profession of a civil engineer."

3. In consequence of illness, James Derby ceased to attend the defendant's office on the 8th of May, 1865.

4. On the 24th of May, 1865, the plaintiff wrote a letter to the defendant, informing him of the illness of James Derby, and trusting that in a few days he would be able to resume his duties again.

5. On the 26th of June, 1865, the defendant received a further letter from the plaintiff, stating that James Derby was much better, and trusting that he would continue to improve, &c.

6. James Derby died on the 4th of August, 1865, and the plaintiff informed the defendant of his death by a letter dated the 14th, wherein he asked the defendant to name an early day to settle the matters, as provided for in the articles of apprenticeship. In reply to that letter, the defendant wrote on the 7th of September, promising to appoint an early meeting on his return to town.

7. On the 28th of March, 1866, the defendant received from the plaintiff the following certificate of two duly-qualified medical men, within the meaning of the indenture:—

"We hereby certify that we saw, in consultation, James Derby on or about the 11th of June, 1865; that he was then suffering from diseased heart and dropsy; and that his health had then failed, so as permanently to incapacitate him from following the

profession of a civil engineer, and from carrying out his apprenticeship under an indenture made the 6th of May, 1865, between W. Humber of the one part, and James Thomas Derby and the said James Derby, his son, of the other part. Dated, &c.

"Robert Quain, M.D.

"George R. Arnold, M.R.C.S."

This certificate was not made or written until the 24th of March, 1866, and was not produced to the defendant until the 28th of March, 1866.

8. The defendant received from the plaintiff on the same day for the first time, a formal demand of the sum of 50*l.*, but the defendant refused to pay it, and it remains unpaid.

The questions for the opinion of the Court were: First, whether the death of James Derby put an end to the indenture and all covenants and agreements therein contained; secondly, whether it was necessary that a notice of James Derby's incapacity, and the plaintiff's intention to avail himself of the stipulation in the indenture, together with a proper medical certificate according to the agreement, should be served upon the defendant previously to the death of James Derby; thirdly, whether the said certificate of two medical men was admissible in evidence, inasmuch as it was made after the death of James Derby; fourthly, whether the agreement to accept a certificate as evidence of the sickness and incapacity of James Derby was or was not determined by his death, or was any longer binding upon the defendant; fifthly, whether, under the circumstances of the case, the plaintiff was entitled to a return by the defendant of the said sum of 50*l.*

Bosanquet, for the defendant, contended that the conditions which were to entitle the plaintiff to a return of the 50*l.*, viz. the failure of the health of James Derby, and the production of the certificate of two duly-qualified medical men, had not been complied with, inasmuch as the death of James Derby had occurred before the plaintiff had exercised the option given him by the deed.

[BOVILL, C.J. The certificate is only evidence of the fact of the failure of health of the apprentice. Suppose he had not died?]

In that case it must be conceded that the medical certificate would have been conclusive evidence. Down to the time of his

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death, the father was insisting that his son should continue in the service of the defendant.

[MONTAGUE SMITH, J. Has not everything happened to entitle the plaintiff to recover back the 50*l.*, and something more also?]

The certificate of failure of health should have preceded the death; the plaintiff was not entitled to put an end to the service under the indenture after the happening of that event.

Raymond, contrà, was not called upon.

BOVILL, C.J. The question in this case turns upon the construction of an apprentice deed which contains a special provision that, in the event of the health of the apprentice failing, so as to incapacitate him from following the profession of a civil engineer, before the 1st of April, 1866, the master would refund 50*l.* of the premium; it being agreed between the parties that the production at any time before that day of a certificate signed by two duly-qualified medical men, testifying as to the fact, should be conclusive evidence that the health of the apprentice had failed, so as to incapacitate him. The matter of fact upon which the return of the money was to depend, was, the failure of the apprentice's capacity to continue in the service before April, 1866. There was abundant evidence of that here: his death was pregnant evidence of that. The certificate of the medical men was to be conclusive proof. The incapacity of the party having occurred long before the 1st of April, 1866, a certificate of two duly-qualified medical men was signed and sent to the defendant after the death of the apprentice. I am of opinion that that was a sufficient compliance with the provisions of the deed, and that the decision of the judge holding that the plaintiff was entitled to recover should be affirmed, with costs.

WILLES, KEATING, and MONTAGUE SMITH, JJ., concurred.

Judgment for the plaintiff.

Attorney for plaintiff: *Helsham.*

Attorneys for defendant: *Hore & Sons.*

ANDREW AND WIFE *v.* PELL.

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Jan. 29.

Practice—Inspection of Documents at Common Law—Assents to a Deed under the 192nd section of the Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134).

A creditor has a right to demand inspection at common law of the written assents to a deed under the 192nd section of the Bankruptcy Act, 1861; they being by virtue of the statute part of the deed itself.

THE defendant's goods having been seized by the sheriff under a writ of fi. fa. at the suit of the plaintiffs, a claim was made on behalf of the trustees under a deed of inspectorship executed by the defendant under the 192nd section of the Bankruptcy Act, 1861, 24 & 25 Vict. c. 134, and an issue was directed.

On the 10th of December, 1866, Willes, J., made an order that the trustees should, within forty-eight hours from the service thereof, produce for the inspection of the plaintiffs or their attorneys or agents the several written assents alleged to have been given by the creditors of the defendant to the above-mentioned deed. On the hearing of a previous summons to amend the issue, Martin, B., had been asked to make it part of his order that such inspection should be granted, but he refused to do so.

The order of Willes, J., of the 10th of December not having been complied with, he, on the 18th, made a further order that the trustees be precluded at the trial from giving any evidence in support of or setting up the deed of inspectorship unless the first-mentioned order was complied with within four days.

Beresford now moved to rescind the order for inspection, on the ground that it was calling upon the trustees to disclose part of their case.

WILLES, J. The application was for inspection at common law, and not under the 14 & 15 Vict. c. 99, s. 6. As the Bankruptcy Act makes the assents in a given event binding on all the

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creditors, the plaintiffs have clearly as much right to inspect them as they have to inspect the deed itself. The assents are in effect part of the deed. The matter is perfectly free from doubt.

BOVILL, C.J., and KEATING and MONTAGUE SMITH, JJ., concurred.

Rule refused.

Attorneys for the trustees: *Elmslie, Forsyth, & Sedgwick.*

Jan. 29.

NASH *v.* DICKENSON.

Sheriff—Poundage and Fees—What amounts to a Levy under a Writ of fi. fa.

A sheriff's officer went with a warrant to the defendant's premises for the purpose of levying under a fi. fa., and, without saying or doing anything more, produced the warrant and demanded the debt and costs, together with poundage and expenses of levy. The money was paid under protest:—

Held, that this did not amount to a levy, so as to entitle the sheriff to poundage or the officer to fees.

A WRIT of fi. fa. having been issued against the defendant in this action, an officer of the sheriff of Surrey went with a warrant to the defendant's premises in Southwark for the purpose of levying. The lower part of the premises (the defendant being tenant of the whole) consisted of a passage, in which were some oil-cloth and fixtures belonging to the defendant. In this passage were two doors, one on the side leading to a shop occupied by a jeweller, the other at the end leading to the defendant's counting-house. When the officer got there, the outer door was open, but the counting-house door was locked; and he was met in the passage by a clerk of the defendant's attorney, who was prepared to pay the debt and costs, but who did not appear to have tendered the money. The defendant then came in, and, causing the door to be opened, invited the officer into the counting-house. Having entered, the officer produced the warrant, and, without saying or doing anything more, at the defendant's request made out an account of what he claimed for debt and expenses, as follows:—

	£	s.	d.
Debt and costs	137	15	4
Costs of execution	1	7	6
Sheriff's poundage	6	18	0
Officer's fee	1	1	0
Discharge	0	4	6
Interest	0	2	0
Man in possession	0	5	0
	£147	13	4

The defendant paid the money under protest.

Nov. 23, 1866. *Prideaux* obtained a rule calling upon the sheriff to shew cause why he should not refund to the defendant or to his attorney the several sums of 6*l.* 18*s.* for poundage, 1*l.* 1*s.* officer's fee, 4*s.* 6*d.* discharge, and 5*s.* man in possession, the amounts respectively overcharged by his officer for fees on the execution of the fi. fa., with costs. He submitted that, there having been no levy, no fees or poundage at all were payable, and that, at all events, the demand of 4*s.* 6*d.* for "discharge" was illegal and extortionate, citing *Masters* v. *Lowther*. (1)

Jan. 29. *Abbott* shewed cause. The first question is, whether there was a seizure under the warrant. It is submitted that there was. The outer door being open, the sheriff's officer went into the passage, which was in the occupation of the defendant.

[BOVILL, C.J. He said nothing, and did nothing. Does that constitute such a seizure under the fi. fa. as to entitle the sheriff to poundage?]

Swann v. *Earl Falmouth* (2) shews that it was such a seizure as would render the sheriff liable in trespass, if unauthorized.

[BOVILL, C.J. That was a distress for rent; and something was done there: a notice was left, intimating to the tenant that a seizure had been made, and that certain consequences would follow if the rent were not paid.]

In *Hutchins* v. *Scott* (3), the broker went to the tenant's house,

(1) 11 C. B. 948. (2) 8 B. & C. 456.

(3) 2 M. & W. 809.

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and pressed for payment of rent alleged to be due, and 3*l.* 3*s.* for expenses of the levy, but touched nothing, and made no inventory. The tenant paid him the rent and expenses under protest, on which the broker withdrew. In an action against the landlord for an excessive distress, it was held that the defendant was estopped from saying that there had been no actual distress.

[BOVILL, C.J. What was done there was treated by both parties as a distress; and the landlord was held to be estopped from saying that there had been no distress.]

So, here, the sheriff would be estopped from saying that there had been no seizure. There was floor-cloth, and there were other fixtures in the passage, which might have been taken. The officer may seize a term for years. (1)

[BOVILL, C.J. It is not enough to shew that the sheriff would be estopped. It must be shewn that the defendant is estopped from saying that there was no seizure.]

In Impey's Sheriff, 6 ed. 120, treating of execution by fi. fa., it is said: "By this writ the sheriff is commanded to levy the debt of the goods and chattels of the defendant, and he is therefore indemnified as far as he acts necessarily in order to the taking of the goods. *If he gets into the house, the doors being open, then begins the execution*, for the rest of the house is only for the protection of the goods." The tender should have been made outside the house.

[BOVILL, C.J. There was no seizure in point of fact. What happened to make this a constructive seizure?]

The officer went with a warrant for the purpose of seizing, and obtained admittance to the interior of the house. There is no magic in the words "I seize."

[WILLES, J. Nor is there any reason for calling a thing that which it is not. In Atkinson on Sheriff Law, 3 ed. 181, the sheriff is warned to seize only enough to satisfy the writ. (2) If the officer enters the hall of a house having a warrant with him, what does he seize?]

All the goods upon the premises, or at all events so much as will suffice to satisfy the claim for debt and costs.

(1) See *Palmer's Case*, 4 Co. Rep. 74.

(2) "His duty is to seize such a quantity of goods only as are reasonably sufficient to satisfy the amount indorsed on the writ:" *Aldred* v. *Constable*, 6 Q.B. at p. 381; *Gawler* v. *Chaplin*, 2 Exch. at p. 507.

Prideaux, Q.C., was not called upon.

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BOVILL, C.J. I think the facts fail to shew a seizure under the writ. The sheriff should make an actual seizure. It would be imposing a serious responsibility upon him, if what was done here were held to be a seizure of all the goods upon the premises. Without saying what is a seizure, it is sufficient to say that there has not been enough done here to constitute a seizure. In all the cases of arrest upon a ca. sa., some act has been done towards the restraint of the person of the defendant.

WILLES, KEATING, and MONTAGUE SMITH, JJ., concurred.

Rule absolute.

Attorney for defendant: *John Biggenden.*
Attorneys for sheriff: *Abbott, Jenkins, & Abbott.*

SCOTT, PUBLIC OFFICER OF THE UNION BANK OF LONDON *v.* LORD EBURY AND OTHERS.

Jan. 14.

Principal and Agent; Ratification of Act of Agent—Public Company; Liability of Promoters for Advances obtained on Account of the Undertaking.

One J., acting as the solicitor and secretary of a projected railway company, by the authority of the promoters, and by means of a cheque signed by two of them, obtained from the plaintiff an advance of 500*l.*, to be applied in payment of parliamentary fees, upon an agreement expressing that it was "to be repaid out of the calls on shares." An act authorizing the construction of the railway passed, the promoters being named therein as the first directors; and at a meeting subsequently held the directors passed a resolution that the acts of J. should be adopted and confirmed. No shares were allotted or calls made, and the undertaking was not proceeded with:—

Held, that the advance was made upon the personal responsibility of those who signed the cheque, and that the subsequent adoption of their acts by the directors did not alter their position.

THE first count of the declaration stated, that, before the making of the promises thereinafter mentioned, the defendants were the directors of the Rickmansworth, Amersham, and Chesham Railway Company, which said railway company were customers of and had an account with the said banking company; and, the defendants so

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being such directors as aforesaid, in consideration that the said banking company would allow them to draw to the extent of 1000*l.*, to be repaid out of the calls on shares in the said railway company, promised the said banking company that they the defendants, so being such directors as aforesaid, would within a reasonable time in that behalf make calls on shares in the said railway company sufficient to repay to the said banking company the said sum of 1000*l.*, and repay them the said sum; that the said banking company did allow the defendants to draw, and the defendants, so being such directors as aforesaid, did draw to the extent of 1000*l.*; and that all things had happened, and all times elapsed, and all conditions were fulfilled to entitle the said banking company to have the calls on the said shares so made as aforesaid, and to be paid the said sum of 1000*l.* by the defendants; yet that the defendants did not nor would within a reasonable time in that behalf make calls on shares in the said railway company sufficient to repay the said banking company the said sum of 1000*l.*, nor repay them the said sum, and the same remained wholly due and unpaid.

The second count alleged the promise to be that there were shares in the said railway company on which calls could be made sufficient to repay the 1000*l.*, and that the defendants, so being such directors as aforesaid, would within a reasonable time in that behalf make calls on the said shares in the said railway company sufficient to repay to the said banking company the said sum of 1000*l.*, and repay them the said sum: and the breach alleged was that the defendants did not nor would within a reasonable time in that behalf make calls on shares in the said railway company sufficient to repay the said banking company the said sum of 1000*l.*, nor repay the said sum of 1000*l.*, and the same remained wholly due and unpaid.

There was also a count for money lent, money paid, and money found due on accounts stated.

The defendants pleaded,—first, to the first and second counts, that they did not promise as alleged,—secondly, to the same counts, that the banking company did not allow the defendants to draw, nor did the defendants draw to the said extent as in those counts respectively alleged,—thirdly, to the first count, that there were no

shares in the said railway company which had been issued to and were then held by shareholders therein upon which shares calls could be made for repaying the said sum to the said banking company,—fourthly, to the first count, that they did within a reasonable time in that behalf make calls upon all the shares in the said railway company which had been issued to and were then held by shareholders therein, to the full amount and extent which they as such directors were by law authorized and entitled to do, but that they did not obtain by means of such calls, and had not, any funds out of which they were able to repay to the said banking company the said 1000*l.* or any part thereof,—fifthly, to the last count, never indebted. Issue thereon.

At the trial before Willes, J., at the last Surrey assizes, it appeared that the action was brought by the plaintiff, one of the public officers of the Union Bank of London, to recover from the defendants a sum of 500*l.* alleged to have been advanced for their use under the following circumstances:—In the year 1861, the defendants, Lord Ebury, the Hon. R. A. Capel, Colonel Elsey, and Messrs. Dillon and Cary, were promoting a bill in parliament for the construction of a railway from Rickmansworth, in Hertfordshire, to Amersham and Chesham, in the county of Bucks, to be called "The Rickmansworth, Amersham, and Chesham Railway," through one Jeyes, their agent and solicitor. The proposed line was to be an extension of the Watford and Rickmansworth railway, at a meeting of the directors of which railway on the 11th of November in that year (the directors present being, with the exception of Colonel Elsey, the now defendants and a Mr. Warwick), it was resolved "that it is very desirable that the line from Rickmansworth to Chesham be carried out, and that the following gentlemen (naming the five defendants) be the first promoters, in conjunction with the London and North Western Railway Company, with power to add to their number; and that the solicitor (Jeyes) be and is hereby instructed to take all necessary steps for obtaining acts of parliament for carrying out both these undertakings." In June, 1862, the bill for the construction of the Rickmansworth, Amersham, and Chesham railway being ready for the third reading, and for the Royal assent, and money being wanted for payment of the House fees, Jeyes, by the authority, as he stated, of

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the defendants, or at all events of two of them, viz. Capel and Cary, applied to the Union Bank for permission to draw on them to the extent of 1000*l.* The bank assented to the proposal, but required Jeyes to give them a letter embodying the request. This he engaged to do, and a cheque for 500*l.*, headed "Rickmansworth, Amersham, and Chesham Railway," expressed to be for "Parliamentary expenses: House fees," was drawn and signed by Capel and Cary, and countersigned by Jeyes as secretary. The cheque was dated the 30th of June, 1862, but was not presented until the 10th of July, when the money was obtained, and applied in payment of the necessary fees. The bill received the Royal assent on the 17th of July, 1862 (25 & 26 Vict. c. lxxi), and the defendants were by s. 12 named as the first directors of the company. On the 1st of August, 1862, in pursuance of his promise to the manager of the bank, Jeyes addressed a letter to him, as follows:—"I have to request that you will allow the directors of the Rickmansworth, Amersham, and Chesham railway to draw to the extent of 1000*l.*, to be repaid out of the calls on shares." The 1000*l.* was placed to the credit of the railway in an account in the bank books headed "Rickmansworth, Amersham, and Chesham Railway;" but no more than 500*l.* of it was ever drawn for.

A minute of the 24th of October, 1862, was put in, to the following effect:—"Mr. Jeyes having stated generally what had been done, and that the act of incorporation had received the Royal assent on the 17th of July, 1862, Resolved that the proceedings connected with the application to parliament and otherwise on behalf of the company by Mr. Jeyes, be adopted and confirmed."

By a resolution of the directors of the 20th of November, 1863, Jeyes ceased to act as secretary, and at his suggestion one Oliphant was appointed secretary in his stead. Jeyes, however, continued for some time longer to act as solicitor for the company.

The act of parliament contained the usual clause (s. 58) providing that "the expenses, costs, and charges of obtaining and passing the act, and incidental and preparatory thereto, shall be paid by the company."

No shares were ever allotted or calls made, and the undertaking was not proceeded with, though an act had been obtained (28 & 29

Vict. c. cxlvii) for extending the time for completing the line, which time had not yet expired.

An account was afterwards (June 30, 1864), sent in by the bank to the company, which was headed: "Rickmansworth and Amersham Railway Company, in account with the Union Bank of London," and in which the company was debited with the sum in question, and interest; and in 1865, the bank brought an action against the company, in which a judgment was obtained and an elegit issued; but no fruits were obtained.

On the part of the defendants, it was contended that the advance obtained from the bank was not a loan to the directors personally, but a loan to the company, to be repaid out of the funds of the company, when funds should be obtained by means of calls; and that the subsequent ratification by the company of the act of Jeyes in obtaining the advance at all events transferred the liability to them.

For the plaintiff, it was contended, that the money having been obtained before the act for incorporating the company had passed, no one but the promoters who actually borrowed the money could be liable; and that no subsequent ratification by the company could alter their position.

His lordship ruled that the money was borrowed upon the terms of the letter of the 1st of August, 1862, and that there was at all events a case as against the two directors who signed the cheque,—Capel and Cary. It was, however, conceded on the part of the defendants, that, if any of them were liable for the advance in question, they were all to be considered liable except Colonel Elsey, as to whom the case was not pressed; he never having acted as a director, but merely having permitted his name to remain in the bill before parliament, in order to prevent the expense and delay which would have been occasioned by its withdrawal at that stage.

The learned judge thereupon made an order, striking the name of Colonel Elsey out of the record; and he directed a verdict to be entered for the plaintiff as against all the other defendants, for 500*l.* and interest, as agreed, reserving leave to them to move to enter the verdict for them on the grounds that the letter of the 1st of August, 1862, did not amount to a warranty that the money

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should be repaid at all events, and that the subsequent ratification by the company of the act of Jeyes, transferred the obligation to them,—the Court to draw inferences of fact.

Nov. 7, 1866. *J. Brown, Q.C.*, obtained a rule nisi to enter a verdict for the defendants, on the grounds that the letter of the 1st of August, 1862, on which the plaintiff sued, was not a personal contract by the defendants, but was a contract of the company of which they were the directors, or at all events became so when ratified by the company; and that the evidence shewed that the loan sued for was a loan to the company and not to the defendants, and was to be repaid by the company and not by the defendants; that, if the letter was a personal contract by the defendants, it contained no warranty of repayment, or that calls should be made, or shares allotted; and that the evidence proved that no shares were taken and no calls could be made before the action was brought, and that calls may possibly be hereafter made, out of which the plaintiff may be repaid.

Jan. 14, 1867. *M. Chambers, Q.C.*, and *Wood*, shewed cause. The question is, whether the money borrowed was borrowed upon the personal credit of the defendants, and whether the mere resolution of the board ratifying and confirming their contract, absolved them from the liability they had already personally incurred. The contract, it is submitted, is a contract that the promoters will, when the act shall have passed, make calls to enable them to repay the money within a reasonable time; or, if they have omitted to put themselves in a position to make such calls, they are equally liable. So, if they professed to contract on behalf of the company, and had no power to do so, then *Kelner* v. *Baxter* (1) is a distinct authority to shew that there can be no ratification by a company which was not in existence at the time the contract, which they profess to ratify, was entered into.

[WILLES, J. Substitution is the proper expression.]

There could be no substitution of a new contract by the company for the original contract by the parties, without the assent of the bank. And there is no evidence of any such assent here. Then, as to the account rendered by the bank to the company and

(1) Ante, p. 174.

the action brought against them, these it will probably be said amounted to an election to charge the company and not the promoters personally. But there is nothing inconsistent or unreasonable in the bank having a double remedy for the advance, one against the company under the 58th section of their act of incorporation, which provides that "the expenses, costs, and charges of obtaining and passing of the act, and incidental and preparatory thereto, shall be paid by the company," the other against the defendants on their personal contract. The bringing of the action did not amount to a release.

J. Brown, Q.C., and *Horace Lloyd*, in support of the rule. This was a loan for the purposes of the company, and to be repaid out of the funds of the company, and not by the directors personally; and there was no engagement express or implied to make calls, but a mere expectation that calls would in the ordinary course be made. When Jeyes, the solicitor of the promoters, early in July, requiring money to pay certain parliamentary fees, applied to the Union Bank for an advance of 1000*l.*, they required from him a letter stating on what authority the money was to be lent. Before Jeyes could communicate with the promoters, time pressing, he on the 10th of July went to the bank with a cheque for 500*l.*, signed by two of them, viz. Capel and Cary, the cheque being headed "Rickmansworth, Amersham, and Chesham Railway," and purporting to be drawn expressly for "Parliamentary expenses: House fees," which fees by the 58th section of the special act the promoters (who by s. 12 were named the first directors of the company) were bound to pay. The 500*l.* was thereupon advanced by the bank, Jeyes promising to procure a letter of authority. The bill passed on the 10th, and received the Royal assent on the 17th of July; and on the 1st of August Jeyes handed to the manager of the bank the letter upon which this action is founded. It is to be observed that this letter is not signed by any of the promoters, but by Jeyes only; and it purports to be a request by *him* that the bank will allow *the directors* of the Rickmansworth, Amersham, and Chesham railway to draw to the extent of 500*l.*, "*to be repaid out of the calls on shares.*" And this arrangement was ratified by *the company* by a resolution of the 24th of October following. It is said that the company could not ratify the act of Jeyes: and for

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this *Kelner* v. *Baxter* (1) has been relied on. There, however, there was an undertaking in writing by three individuals to pay for goods sold to them for the proposed company, and a particular day was named for payment of the money. Some members of the Court there thought that an incorporated company could not ratify an undertaking made for them before their formation, for it might be that the company would never be incorporated at all. But here the company was actually formed, and the bill had passed before the undertaking was given. It was the undertaking of the company through their solicitor and secretary, Jeyes. By the consent of the creditor, the debtors, and the company, the latter might clearly be substituted for the original parties. That appears to have been so here.

[WILLES, J. I doubt whether that is open to you upon this rule. It might be an important question how far the bank would be bound; and that should have been left to the jury.]

That the bank considered the company to be their debtors is manifest from their conduct. In the accounts rendered by them,—the last being so late as the 30th of June, 1864,—they so treat them; and they afterwards sued the company for this very advance, and obtained judgment against them; and it was not until their execution against the company had proved fruitless that they had recourse to the personal responsibility of the now defendants. It was clearly the intention of both parties at the time the advance was made that the money should be repaid by the company. The subsequent history of the undertaking is not to be regarded in construing the contract.

[WILLES, J. If Jeyes had paid the House fees out of his own pocket, he would undoubtedly have had a remedy against the promoters personally, for they employed him to carry out the arrangements for their incorporation, and the obtaining the loan was necessary for that purpose. I do not say that this is decisive; but it is a step towards a decision.]

It is not enough for the plaintiff to establish that this was the undertaking of the individual promoters. He must shew that the time for payment has arrived. The letter of the 1st of August expresses that the loan is to be repaid out of the calls on shares.

(1) Ante, p. 174, 12 Jur. N.S. 1016.

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None have been made. The plaintiff seeks to add to the contract, "such calls to be made in a reasonable time." There is no warrant for that interpolation. There is no implied undertaking on the part of the company to make calls at any particular time. The time for making calls is in all cases in the discretion of the directors: 8 & 9 Vict. c. 16, s. 22: and this, being common knowledge, must be taken to have been present to the minds of all the parties at the time of contracting. In *Thicknesse* v. *Lancaster Canal Company* (1), a company was impowered by an act of parliament to make a canal within certain local limits, without specifying any time within which it was to be completed: and it was held that no limitation as to time could be assigned to the powers conferred, by an intendment that they were to be exercised within *a reasonable time*, and consequently that the works might be resumed at any period. There there had been a cessation for twenty years.

[MONTAGUE SMITH, J. In consequence of that case, all modern railway acts contain a limit.]

The limit fixed here (by s. 23) was, three years from the passing of the act for the compulsory purchase of lands, and four years for the completion of the railway. These periods have been respectively extended by the 28 & 29 Vict. c. cxlvii. ss. 3, 4, till the 1st of August, 1867, and the 1st of August, 1868. Calls may therefore yet be made out of which this loan may be repaid.

BOVILL, C.J. The first point which arises in this case is, whether the money sought to be recovered was advanced by the plaintiff to be repaid by the company or by the directors personally. It is agreed that all are to be considered liable if any of them are. The advance was obtained by Jeyes, who was the solicitor and secretary of a company in course of formation but not yet incorporated. The defendants were the promoters of the undertaking. They were applying for an act of parliament to enable them to carry it on; and they authorized Jeyes to take the necessary steps and to incur expenses in obtaining it, and afterwards adopted and ratified all that he had done. At the time the advance was made, viz. on the 10th of July, 1862, the bill was ready for the third reading, but was stopped for want of money to pay certain fees. The letter

(1) 4 M. & W. 472.

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of the 1st of August, though written afterwards, must be taken to express the terms on which the advance was made. It was obtained on the authority and upon the credit and on behalf of the defendants, the promoters, and was applied to the purpose for which it professed to be obtained, viz. the payment of expenses for which they were liable. The cheque though purporting to be drawn by two, must be assumed to have been drawn by the whole four. If, then, the defendants were originally liable, it is difficult to see how they could be relieved from responsibility. It was contended that the promoters were absolved by the subsequent ratification of the contract by the company. But the case of *Kelner* v. *Baxter* (1) shews that, as the company was not then in existence, there could be no such ratification. As my Brother Willes there puts it, "Ratification can only be by a person ascertained at the time of the act done, by a person in existence either actually or in contemplation of law." It was further contended that the defendants are relieved by some substituted contract. There is no such substituted contract in writing: nor do I find any oral contract to that effect. Such a contract is sought to be inferred from the account sent in by the bank treating the company as the debtors, and from the fact of an action having been brought by them and prosecuted to judgment against the company. But I do not think the rights of the plaintiff as against these defendants are at all compromised by either of those circumstances. The special act contains a clause (s. 58) providing that the expenses, costs, and charges of obtaining and passing the act, and incidental and preparatory thereto, shall be paid by the company. That creates a legal liability in the company to pay those expenses: and *Carden* v. *General Cemetery Company* (2) is an instance of such a liability being enforced by action. Whether money lent for the purpose of paying for professional services in prosecuting the bill would be expenses within such a clause may be a question: but I think money advanced for the purpose of paying the House fees may fairly be considered as expenses incidental to the passing of the act. The action was not brought against the company on a substituted contract, but was framed upon an original liability for money lent. I see no principle upon which these defendants are to be exempted from liability

(1) Ante, p. 174. (2) 5 Bing. N. C. 253; 7 Scott, 97.

upon their contract, because the plaintiff has made an abortive attempt to obtain the money from the company. The next objection is, that, inasmuch as by the terms of the letter of the 1st of August, 1862, the loan was to be repaid out of calls on shares, the personal liability of the defendants was excluded, and the plaintiff was to look only to the source indicated for payment. I cannot, however, assent to that view. It is very unlikely that the bank would have consented to take upon themselves the risk of the undertaking proving successful, or of calls being made, or paid if made. It is said those words would give the bank a claim in equity to have the first calls appropriated to their advance. Whether that be so or not, it is not material to consider. There was a case in this Court in the year 1848, of *Pilbrow* v. *Pilbrow's Atmospheric Railway Company* (1), which is very much in point. The defendants covenanted, on the conveyance of a patent, to pay to the plaintiff 15,000*l.* "out of the money raised by the first instalments or calls on the shares of the company." It was contended on the part of the defendants that the money was not to be paid at all events, but only out of the first instalments, and that, as none had been obtained, they were not liable. But the Court held that that was not the correct construction of the contract; and that, the plaintiff, having parted with his patent, was entitled to be paid the price agreed on. The judgment of the Court is very strong to that effect, especially that of Maule, J., who says (2): "There is no covenant on the part of the defendants to make calls; and they would not be guilty of any breach of duty in abstaining from making calls, provided they paid the money. It is put on the part of the defendants as a condition precedent to their liability to pay the 15,000*l.*, that there should be funds in their hands arising from calls on shares sufficient for that purpose. The true sense of the covenant, however, as it seems to me, is, that it is a simple covenant to pay. It is true, it points out the fund out of which payment shall be made; but it does not make the raising of that fund a condition precedent to the liability of the defendants." So, here, it may very well be that the words "to be repaid out of the calls on shares," indicate simply the fund out of which the money was to come. It may be that they amount to

(1) 5 C. B. 440. (2) 5 C. B. 472.

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an equitable pledge of that fund; or it may be that they operate to extend the period of payment until the time when calls might be made. We must assume here that a reasonable time for making calls has elapsed; and therefore the time has arrived at which the payment must be made. Upon the whole, I am clearly of opinion that the defendants were personally liable for the original loan, and that nothing has occurred to relieve them from that liability. It is no answer to say that they were unable to raise money enough to construct the railway. They might at all events have made calls sufficient to meet their engagements. The rule must be discharged.

WILLES, J. I am of the same opinion. At the time the advance was obtained from the bank by Jeyes, who professed to act as agent of the promoters, the present defendants, they were the only persons who could be liable, there being no company in existence. Had Jeyes authority to borrow the money upon their credit? I think he had. He derived it in this manner. On the 11th of November, 1861, a meeting of the board of directors of the Watford and Rickmansworth Railway Company was held, the now defendants (Colonel Elsey excepted) being present, and a resolution was come to that it was desirable that the line from Rickmansworth to Chesham should be carried out, and that the defendants be the first promoters, in conjunction with the London and North Western Railway Company; and that "the solicitor (Jeyes) be and he is hereby instructed to take the necessary steps for obtaining acts of parliament for carrying out both these undertakings." Before the 10th of July, 1862, Jeyes had taken all the necessary steps for obtaining an act to authorize the formation of the line in question, and the bill was awaiting its third reading. It was necessary, before such third reading could take place and the Royal assent be obtained, that certain fees should be paid. Who was to pay those fees? Not Jeyes personally. The scheme was a real one. It was the duty of those who employed Jeyes to provide the necessary funds. If Jeyes had found the money himself, he would unquestionably have had a right to be recouped by his employers, the defendants. He did not take that course; and they did not supply the money, but they authorized Jeyes to obtain it. The

bank had no interest in the success of the undertaking: the promoters had, and were probably sanguine as to the result. That being the state of things, I am at a loss to see how the defendants can escape one or other horn of this dilemma, either the money was advanced to be repaid on demand, or it was advanced upon the terms of the letter of the 1st of August, 1862. It is unquestionably for the benefit of the defendants that the letter of the 1st of August should be taken to regulate the terms of the loan: and no doubt that was the intention of the parties. Then, has that original liability been got rid of by anything that has occurred since? In the first place, it has been contended that it has been got rid of by the subsequent ratification of the contract by the company. That, however, could have no effect, because, putting out of view the cases of assignees of bankrupts and administrators, there is no case in which a person can by a subsequent ratification make himself liable as principal, so as to discharge the agent, where the principal was not in existence at the time of the original contract. It would be like the case of a man who has attained the age of twenty-one being sought to be charged by ratification with a contract made when he was in ventre de sa mere, or before. That principle was acted on by us in the recent case of *Kelner* v. *Baxter*. (1) Secondly, it is said that the company were substituted by agreement, for the promoters. There might be a difficulty in establishing this, because the promoters and the directors are identical. And, further, there is a third party necessary to such an arrangement, viz. the bank. It is suggested that the bank shewed their assent to the substitution by sending in an account treating the company as their debtors, and also by suing the company and obtaining a judgment against them. I do not say that there was no evidence of assent. But, when we find that there was no meeting between the company and the bank or any person on their part, nothing to shew that the bank ever contemplated giving up the security of these persons and taking the doubtful security of a company whose ability to form the railway was at best extremely doubtful, I cannot think that any jury could find that there was an agreement for a substitution. The bringing of the action against the company is susceptible of an easy answer. The bank

(1) Ante, p. 174, 12 Jur. N.S. 1016.

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supposed they had a remedy against them under the 58th section of the special act, and were satisfied to get the money from the funds of the company if they could. It was simply a mistaken and abortive course. I therefore come to the conclusion that the defendants were originally liable on the contract entered into on their behalf on the 10th of July; and that nothing which has occurred since has absolved them from that liability. But it is said that the action is prematurely brought; and that the bank must either wait for payment until calls are made, or at all events until the lapse of the period at which it would be practicable to make calls. Now, to hold that they must wait until calls are made would in effect be to throw upon the bank the risk of the act being obtained, and the additional risk of the company's ability to make calls or to get them paid. It is not likely that the bank, who were to get no benefit from the formation of the company, would consent to take upon themselves that risk. The true explanation of the expression of the letter of the 1st of August, 1862, "to be repaid out of the calls on shares," is this:— Parties who embark in schemes like this do not always contemplate the true future. They assume that everything will go on according to their hopes and expectations, and provide for what shall be done in that event, without regarding the possibility of failure. Here, they provided for the case which they hoped for, and in that case stipulated that the money should be repaid out of calls. Would any person have advanced the money upon an agreement such as the defendants contend this to be? Clearly not. The view suggested by Maule, J., in *Pilbrow* v. *Pilbrow's Atmospheric Railway Company* (1) is an authority in favour of our present decision, if it were necessary to look for authority to support a proposition so just and so obvious. Suppose a farmer were to borrow money, to be repaid when he sold his crop of hay, and after the lapse of a reasonable time for effecting a sale the ricks were burnt down, would he be excused from repaying the loan? Or, suppose goods in course of transit to be sold, to be paid for on arrival, and they are lost on the way, could it be contended that the non-arrival of the goods would be an answer to an action for the price? I need hardly say it would not. In each of these

(1) 5 C. B. 440, 472.

cases, it is simply a provision for the *time* of payment. Upon the whole, I am of opinion that the defendants are liable; and I rest my judgment entirely on legal grounds.

KEATING, J. I am of the same opinion. The fact of the money having been advanced before the company was incorporated renders it extremely improbable that the defendants did not make themselves personally responsible upon some terms. The argument urged on the part of the defendants is founded on the supposition that the letter of the 1st of August, 1862, is not to be taken to express the terms upon which the advance was made on the 10th of July. I am clearly of opinion that that letter does contain the terms on which the money was advanced: and I adopt the construction put upon it by my Lord and my Brother Willes. The fair meaning of the contract is, that the advance was to be repaid out of calls, if any; but that it was at all events to be repaid.

MONTAGUE SMITH, J. I am of the same opinion. It was scarcely denied that the money was originally advanced on the personal credit of the defendants. The main question has been as to the terms on which the advance was made, and whether the contract of the company was substituted for the contract of the defendants. I entirely agree in the construction put upon the contract by the rest of the Court, that the money was to be repaid out of the calls on shares; but that, if there were no shares, and no calls made within a reasonable time, the liability of the defendants became absolute. If this were not the true construction of the contract, the bank would have lost their money if the bill had not passed into a law, or if, having passed into a law, it was not acted upon. Assuming it to have been a contract on the part of the defendants that the company would make calls, it must be that they would make them within a reasonable time. In all contracts where no time is specified for the doing of an act, it is to be inferred that it is to be done in a reasonable time. The circumstances urged at the bar on the part of the defendants are all circumstances which might possibly weigh with a jury. But, looking at the document, I can come to no other conclusion than that this was a personal contract on the part of the defendants, and that

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the plaintiff is entitled to recover. To transfer the obligations of the contract to the company when formed, would require proof of some agreement between the bank, the defendants, and the company, by which the former consented to release the defendants and to accept the company as their debtors in lieu of them. If I am to draw inferences, I see nothing from which I am to infer such an agreement. But I do not think that is put to us. The Lord Chief Justice should have been asked to leave that to the jury. I do not, however, think there can be any doubt as to what their finding upon it would have been.

Rule discharged.

Attorney for plaintiff: *A. Dobie.*
Attorneys for defendants: *Hargrave, Fowler, & Blunt.*

Jan. 16.

SCOTT *v.* NORTH.

Broker—Evidence of acting as Broker within the 6 *Ann. c.* 16, *and* 57 *Geo.* 3, *c. lx.*

A witness stated that he took one S. to an office in the city of London used by the defendant, and that upon that occasion four memoranda were made by the defendant, each of the sale by S. of 1000*l.* stock to a person whose name did not transpire; that nothing was handed over at the time; and that he did not see any money pass:—

Held, evidence for the jury of an acting by the defendant as a broker, within the 6 Ann. c. 16, and 57 Geo. 3, c. lx.

THIS was an action brought against the defendant by the chamberlain of the city of London, for penalties under the 6 Ann. c. 16, and 57 Geo. 3, c. lx, for acting as a broker in the sale of stock, without being duly licensed by the corporation.

The cause was tried before Byles, J., at the sittings in London after last Michaelmas Term. A witness named Newby stated that he took one Stanley to the defendant, who was using a friend's office in "King Street" (it was not stated where King Street was situated), and that upon that occasion four memoranda were made by the defendant of the sale of 1000*l.* stock each by Stanley to a person whose name did not transpire. Newby further stated that nothing was handed over at the time, and that he did not see any money pass.

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It was objected on the part of the defendant that this was not evidence to go to the jury of a "dealing in or buying or selling of stock," within the meaning of the statutes at all, and certainly none of any dealing within the city of London.

The learned judge ruled that there was evidence for the jury, but he reserved to the defendant leave to move. The jury found a verdict for the plaintiff for four penalties of 100*l.* each. (1)

Butler Rigby moved to enter a nonsuit. The mere entry or memorandum of a bargain to be completed at a future time is no evidence of a dealing as a broker; and a single isolated transaction is not sufficient to bring a case within the statute of 6 Ann. c. 16, which, to constitute the offence, requires that there should be a general course of dealing in stock or shares. In *Clarke* v. *Powell* (2), where it was held that a stock broker is a broker within these statutes, the special verdict charging a single dealing on a given day, viz. the 27th of June, it was, at the suggestion of the Court, amended by the addition of the following words:—"and did from time to time, both before and since the said 27th day of June, on various occasions, buy divers shares in the government securities transferable at the Bank of England, for divers other persons, for reward in that behalf." That shews that it was considered, if not necessary, at least proper, that a general course of dealing should be alleged and proved. There was no evidence here even of one complete transaction, or of any acting as a broker for reward. Nor was there any proof that that which was done took place within the city of London. For anything that appeared it might have taken place in King Street, Holborn, or any other King Street: and it was for the plaintiff to shew affirmatively and clearly that an offence had been committed.

BOVILL, C.J. I am of opinion that there was abundant evidence to go to the jury of the defendant having taken upon himself to act as a broker, and that the offence was complete without handing over anything. As to the suggestion that "King Street" was not

(1) The penalty of 25*l.* imposed by the 6 Ann. c. 16, is increased to 100*l.* by the 57 Geo. 3, c. lx. s. 2.

(2) 4 B. & Ad. 846.

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proved to be within the city of London, the learned judge could never have intended to reserve leave upon that. If the point had been seriously made at the trial, it would have been cleared up in a moment by re-calling Newby.

WILLES, J. There was abundant evidence to warrant the jury in coming to the conclusion that the defendant had acted as a broker in the sale of stock. As to the other point, if the evidence had been that the transaction took place at "Guildhall," it might with as much reason have been objected that there was a Guildhall at Exeter and at York as well as in London.

KEATING, J., concurred.

Rule refused.

Attorney for plaintiff: *The City Solicitor.*
Attorney for defendant: *J. P. Godfrey.*

Jan. 18.

BROWN AND ANOTHER *v.* BATEMAN.

Debtor and Creditor—Building Contract, Construction of—Equitable Interest of Owner of Land in Materials brought upon the Premises for the Purpose of being used in the Erection of the Houses—Bill of Sale.

By a building contract,—after providing for the erection of houses, and the granting of leases thereof to the builder as they should be finished, and for advances to be made by A., the owner of the land, to enable B., the builder, to carry on the work, to be re-paid before the leases were granted,—it was agreed by Article 7, that "*all materials* which should have been brought upon the premises by B. for the purpose of erecting such buildings, should be considered as immediately attached to and belonging to the premises, and that no part thereof should be removed therefrom without A.'s consent;" and by Article 8 it was further agreed that, "in case B., his executors &c., should fail to proceed with the erection and completion of the houses, or any of them, within the times specified, it should be lawful for A., his heirs &c., to enter upon and take possession of the whole or any part of the land not leased, with all buildings and improvements thereon, and *all bricks and other building materials* thereon, for his and their own absolute use and benefit":—

Held, that the 7th article gave A. such an equitable interest in the *materials* as to disentitle the sheriff to seize them under an execution against B.; and that

A.'s rights under that article were not in any way qualified by the provision contained in the 8th article.

Held, also, that the instrument was not an "assignment, transfer, or other assurance of personal chattels," or a "licence to take possession of personal chattels as security for a debt," within the Bills of Sale Act, 17 & 18 Vict. c. 36.

THIS was an action against the sheriff of Surrey for an alleged false return of nulla bona to a writ of fi. fa. at the suit of the plaintiffs against one Hargreaves.

The defendant pleaded,—first, not guilty,—secondly, that there were not at or after the delivery of the writ to the defendant any goods or chattels of Hargreaves within the defendant's bailiwick, whereof the defendant had notice or could or ought to have levied the money and interest indorsed on the writ, or any part thereof, as alleged,—thirdly, that, after the seizure of the goods, and before a reasonable time for the sale thereof had elapsed, Hargreaves became a bankrupt, and thereupon the defendant withdrew from possession thereof. Issue thereon.

The cause was tried before Channell, B., at the last summer assizes at Guildford. The facts were as follows:—The plaintiffs having obtained judgment against one Hargreaves, a builder, for 58*l.* 19*s.* 6*d.*, a writ of fi. fa., indorsed to levy that sum with interest and expenses, was placed in the hands of the sheriff for execution on the 25th of May last; and on the 27th an officer of the sheriff went to premises in the neighbourhood of Croydon which were in course of erection by Hargreaves, and there seized timber, slates, and other materials which were about to be used thereon, and also ladders and scaffold-poles. On the 18th of June the sheriff was ruled to return the writ. A sale of the articles seized was advertised by the officer for the 20th of June: but, the officer having received an intimation that Hargreaves had signed a declaration of insolvency, the sale was postponed till the 23rd; and on that day the officer, instead of selling, withdrew from possession. Notice was given on the same day to the plaintiff's attorney, and also to the sheriff, that Hargreaves was duly adjudicated a bankrupt on the 21st.

The timber and materials upon the premises were also claimed by one Holledge under a building agreement entered into between him and Hargreaves on the 28th of September, 1865; and the

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ladders and scaffold-poles were claimed by W. H. Hargreaves, the son of the judgment-debtor.

The material parts of the agreement with Holledge were as follows:—

1. "That, in consideration of the stipulations and agreements hereinafter contained on the part of Hargreaves, he, Holledge, shall and will, when and so soon as Hargreaves shall have erected the messuages and buildings hereinafter agreed to be erected upon the hereditaments and premises hereinafter described, in manner hereinafter mentioned, at the request of Hargreaves, his executors, &c., demise unto Hargreaves, his executors, &c., All that piece or parcel of land situate, &c., Together with the messuages and buildings respectively which may be erected thereon, &c., To hold the same from the 29th of September, 1865, for the term of ninety-nine years, at the following rentals, &c.; such annual rent or rents to commence from the 29th of September, 1866," &c.

2. Provision as to leases, and the covenants to be contained therein.

3. Provision as to the buildings to be erected, and the periods for their completion.

4. Provision for separate leases, if required by Hargreaves.

5. "And in order to assist Hargreaves in the said building operations, Holledge hereby agrees that, when and so soon as Hargreaves shall have erected and covered in the carcase of the public-house agreed to be erected as aforesaid, and fenced in the same, he, Holledge, his heirs or assigns, will, at the request of Hargreaves, his executors or administrators, pay, advance, or supply to or for him or them the sum or value of 200*l.*, or, if Holledge be willing, any larger sum or value; and, when and so soon as Hargreaves shall have erected and covered in the several carcases of the messuages &c. respectively agreed to be erected on any one or more of the said other blocks as aforesaid, and fenced in the same, he, Holledge, his heirs or assigns, will, at the request of Hargreaves, his executors or administrators, pay, supply, or advance to or for him or them in money or value after the rate of 60*l.* for each house so covered in as aforesaid; and, when and as soon as the floors are laid, stack pipes fixed, and drains made respectively therein or thereto, after the rate of the further sum of 20*l.* for

each house: all such advances or supplies respectively, together with interest thereon after the rate of 5*l.* per cent. per annum from the date or dates of such advances, to be respectively repayable and repaid in cash by Hargreaves to Holledge within the space of three calendar months from the time when the several messuages and public-house in respect of which the same advances were respectively made are hereinbefore respectively agreed to be respectively erected and covered in; and Hargreaves, his executors &c., shall not be entitled to require or have any lease or leases of any of the said blocks, until he or they shall have repaid all advances made in respect of the block or blocks so required to be leased, and the interest thereof."

6. "That, until such lease or leases shall have been granted as aforesaid, Hargreaves shall and will perform and keep all and every the stipulations agreed to be inserted in such lease or leases as aforesaid on the part of the lessee, so far as the same can or may be applicable, in the same manner as if the same lease or leases were already granted."

7. "That all bricks, timber, materials, and other things which shall have been brought upon the said premises by or for Hargreaves, his executors &c., for the purpose of erecting such buildings as aforesaid, shall be considered as immediately attached to and belonging to the said premises; and no part thereof shall be removed therefrom by him or them without the consent in writing of Holledge, his heirs or assigns, or his or their surveyor."

8. "That, in case Hargreaves, his executors &c., shall fail to proceed with the erection and completion of the said houses and buildings respectively, or any of them, so and in such manner as that the same may be completed within the times respectively hereinbefore appointed in that behalf (and which times respectively it is hereby declared and agreed shall be considered as of the essence of this contract), then and in such case, and immediately or at any time or times after such default, and notwithstanding any previous waiver (if any), it shall be lawful for Holledge, his heirs or assigns, upon obtaining or receiving a certificate from his or their surveyor of such default having been made, to enter into and upon and take possession of the whole or any part of the said land which shall not have been comprised in any lease or leases then

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granted as aforesaid, or been purchased and conveyed as hereinafter mentioned, with all buildings and improvements thereon, and *all bricks and other building materials standing and being thereon*, for his and their own absolute use and benefit; and thereupon this agreement, and every clause, matter, and thing herein contained on the part of Holledge, his heirs or assigns, shall cease and be void both at law and in equity, but without prejudice to any other right or remedy which he or they may have or might have had against Hargreaves, his executors or administrators, for or on account of the breach of any of the agreements hereinbefore contained on his or their part."

It was contended on the part of the defendant, that, as the building materials were under the agreement the property of Holledge, the owner of the land, and the implements belonged to the son of the judgment-debtor, there was nothing that could have been seized and sold by the sheriff under the fi. fa.

The jury found the value of the materials provided for and meant to be used in the houses to be 45*l.* They also found the scaffolding to be the property of the judgment-debtor, and to be of the value of 10*l.*

The learned judge thereupon directed a verdict to be entered for the plaintiff for 55*l.*, and reserved leave to the defendant to move to reduce it by the sum of 45*l.*, the value of the building materials.

Pearce having obtained a rule nisi pursuant to the above leave,

Jan. 16, 18. *Parry, Serjt.*, and *C. H. Hopwood*, shewed cause. The question in this case turns mainly upon the construction of the agreement of the 28th of September, 1865. The general scope of that agreement is, that Hargreaves, the execution-debtor, was to have possession of the land for the purpose of building; that, to enable him to carry out the speculation, advances were to be from time to time made to him by Holledge; and that, to secure to Holledge the repayment of those advances, all the materials which should be brought upon the land for the purpose of being used in the buildings should be considered as appropriated thereto, and should not be removed without Holledge's consent. The

seventh and eighth clauses, which must be read together, confer upon Holledge a licence or right to enter and seize, in case of default by Hargreaves; but do not, as against third persons, convey to him any present interest in those materials, at all events until some act done by him in assertion of his right. It is not a conveyance of an interest in futuro, as in *Petch* v. *Tutin* (1); *Tapfield* v. *Hillman* (2); *Lunn* v. *Thornton* (3); *Gale* v. *Burnell* (4); and *Congreve* v. *Evetts*. (5)

[WILLES, J., referred to *Langton* v. *Waring*. (6)]

That was a sale of specific chattels; and there was a distinct appropriation. The eighth clause is strong to shew that it was not intended that the property in question should pass by the seventh clause, because it expressly provides that it is only upon Hargreaves making default that the option is to be exercised by Holledge; and here there has been no default.

[MONTAGUE SMITH, J. If Holledge had such an interest in the materials as that a court of equity would have restrained the sheriff from selling, the plaintiff could have sustained no damage from his abstaining from so doing.]

The sole question for a court of law to consider is, whether or not the property passed: *Carr* v. *Acraman*. (7) In *Baker* v. *Gray* (8), upon an agreement in terms very similar to those of this instrument, the decision turned upon the absence of a specific appropriation.

[MONTAGUE SMITH, J. The agreement there did not provide that the unused materials should be deemed part of the ship. Jervis, C.J., says: "I think it is most likely that the parties intended that all timber which had been provided for the construction of the ship should be the property of the defendant, in the event of the builder failing to perform his contract. But I do not think they have used language sufficiently clear to carry that intention into effect."]

In *Chidell* v. *Galsworthy* (9), which will probably be relied on for

(1) 15 M. & W. 110.
(2) 6 M. & G. 245.
(3) 1 C. B. 379.
(4) 7 Q. B. 850.
(5) 10 Ex. 298; 23 L. J. (Ex.) 273.
(6) 18 C. B. (N.S.) 315.
(7) 11 Exch. 566; 25 L. J. (Ex.) 90.
(8) 17 C. B. 462, 479.
(9) 6 C. B. (N.S.) 471.

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the defendant, the after-acquired property had been actually seized. Possession had also been taken under the deed in *Hope* v. *Hayley* (1) and in *Carr* v. *Allatt.* (2) The subject has undergone discussion in two recent cases in equity. In *Reeve* v. *Whitmore* (3), it was held by Lord Westbury, C., that an assignment of existing chattels, coupled with words which amount to a mere licence to seize after-acquired property, will not be construed even as an equitable assignment of the latter. That is founded upon the maxim "Licet dispositio de interesse futuro sit inutilis, tamen potest fieri declaratio præcedens, quæ sortiatur effectum, interveniente novo actu." (4) In *Holroyd* v. *Marshall* (5), A., by deed, assigned to B. all the machinery in and about a certain mill, upon trust for securing a sum of money; and it was provided that all the machinery which during the continuance of the security should be fixed or placed in the mill in addition to or substitution for the former machinery should be subject to the trusts of the assignment, and A. undertook to do all that was necessary to vest the substituted and added machinery in B. The assignment was duly registered as a bill of sale, and, after the date of it, A. placed other machinery in the mill, in addition to that which was there at the date of the assignment, and gave notice to B. of each substitution and addition. A. continued in possession according to the terms of the assignment. Vice-Chancellor Stuart held that the machinery being in A.'s possession as agent of B., B. was entitled, as against a judgment-creditor of A. who had sued out execution against A., to the additional machinery (6) but this decision was reversed by Lord Campbell, C., on the ground of A.'s possession not being sufficient to support B.'s claim, and on the ground that to give B. the complete title to the substituted and added machinery, it was necessary that there should be a novus actus interveniens. (7) The House of Lords, on appeal, reversed Lord Campbell's judgment, and gave effect to that of Vice-Chancellor Stuart.

[MONTAGUE SMITH, J. In *Reeve* v. *Whitmore* (3) there was a mere power to enter and seize; but, in *Holroyd* v. *Marshall* (5), there was an absolute conveyance.]

(1) 5 E. & B. 830; 25 L.J. (Q.B.) 155.
(2) 27 L. J. (Ex.) 385.
(3) 33 L. J. (Ch.) 63; 191;
(4) Bac. Max. R. 14.
(5) 33 L. J. (Ch.) 193; 10 H. & C.

If the materials here are to be considered as attached to the premises, it becomes a conveyance of an interest in land, which must be by deed. Even a transfer of chattels, unless accompanied by actual delivery, must be by deed: *Irons* v. *Smallpiece* (1); *Dixon* v. *Yates*. (2) Then, if it is to have any operation at all, this instrument which is not under seal must operate as a bill of sale, and is void for want of registration under the Bills of Sale Act, 17 & 18 Vict. c. 36. By the interpretation clause of that act, s. 7, the expression "bill of sale" is to include "assignments, transfers, and other assurances of personal chattels," or "licences to take possession of personal chattels as security for any debt." This clearly is within the words "other assurances of personal chattels," or "licences to take possession of personal chattels as security for any debt": *Waterfall* v. *Penistone*. (3)

Abbott and *Pearce*, in support of the rule. The seventh clause of the agreement distinctly provides that all materials brought on the premises by or for Hargreaves shall be considered as immediately attached and belonging to the premises. That gave Holledge an interest in them quite independent of the stipulation in the eighth clause, which is addressed to another state of things, viz. a default on the part of Hargreaves in completing the buildings according to the agreement. *Baker* v. *Gray* (4) is an authority to shew that the property in such a case will pass, if an intention that it should pass is manifested by the terms of the contract. "This," it is said, in Blackburn on Contract of Sale, p. 161, "seems to be the principle on which two cases were decided,—*Woods* v. *Russell* (5), in 1822, and *Clarke* v. *Spence* (6), in 1836. In both of them it was held that the property in an unfinished vessel belonged to the purchasers, and not to the assignees of the bankrupt builder. In each of these cases the unfinished ship was specifically ascertained to be the individual ship to which the contracts applied, and the Court considered that the agreements shewed an intention that the property in the vessel should vest as it was made." The same principle is affirmed in *Wood* v. *Bell* (7); though there the Court

(1) 2 B. & A. 551.
(2) 5 B. & Ad. 313.
(3) 6 E. & B. 876; 26 L. J. (Q.B.) 100.
(4) 17 C. B. 462.
(5) 5 B. & A. 942.
(6) 4 Ad. & E. 448.
(7) 5 E. & B. 772; 25 L. J. (Q.B.) 148.

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of Error (1) thought that the circumstances were not sufficient to indicate an intention to pass the materials which had not been fitted to the ship. It is in all cases a question of intention. The decision in *Hawthorn* v. *Newcastle and North Shields Railway Company* (2) went very much upon the same principle. If, then, the intention of the parties was that Holledge should have an interest, legal or equitable, in these materials, the sheriff could not seize them. The definition of a "bill of sale," in the 7th section of 17 & 18 Vict. c. 36, clearly never was intended to apply to a clause of this sort incidentally inserted in a building contract. The Court will look at the whole scope of the instrument in order to determine its legal character.

BOVILL, C.J. I am of opinion that the true construction of the agreement between Holledge and Hargreaves is, that, until possession was taken by Holledge under the eighth clause, Hargreaves must be assumed to have been in possession of the land and of the buildings in course of erection thereon. It is not necessary to consider what was the extent of his interest. On the part of the defendant it has been contended that the agreement contains matter which creates a present interest, legal or equitable, in the landlord, in all materials brought upon the premises to be used in the buildings. Mr. Hopwood, on the other hand, has insisted that the seventh and eighth clauses are to be read together, and that the seventh is controlled by the eighth. Now, the seventh clause provides that "all bricks, timber, materials, and other things which shall have been brought upon the premises by or for Hargreaves his executors, &c., for the purpose of erecting such buildings as aforesaid, shall be considered as immediately attached to and belonging to the premises; and no part thereof shall be removed therefrom by him or them without the consent in writing of Holledge, his heirs or assigns, or his or their surveyor." The eighth clause in certain events authorizes Holledge to take possession of the whole or any part of the *land* not comprised in any lease granted pursuant to the agreement, with all buildings and improvements thereon, and all bricks and other building materials standing and being thereon, for his own absolute use and benefit.

(1) 6 E. & B. 355; 25 L. J. (Q.B.) 321. (2) 3 Q. B. 734, n.

It seems to me that there is nothing inconsistent in these two clauses; but that effect may be given to each. The purport of the seventh clause is to make the materials brought for the buildings part of the property, but only in the same manner as materials actually used in the erection of the buildings. If they became part of the premises they became so subject to the agreement, and would pass by the lease which the landlord was to grant. But the eighth clause was intended to provide for the case of a default on the part of the builder, in which case the landlord was to be at liberty to enter and take possession of the land, with all buildings and materials thereon. This latter clause in no degree qualifies the former. The case must, therefore, rest upon the seventh clause. It is not necessary to say whether that clause creates an express legal interest in the landlord, because in my judgment it confers upon him a clear equitable right to the materials brought upon the premises for the purpose of being used in their construction, without any actual interference on his part; and none of the cases cited shew that such an equitable interest could not be created. That being so, the materials could not be liable to seizure under an execution against the builder. It has been contended that the agreement amounts to no more than a mere licence to Holledge to take possession. But, though the eighth clause might possibly operate as an authority to Holledge to take possession of the buildings and building materials on Hargreaves making default, it appears to me that under the seventh clause Holledge took an immediate interest in the materials. As to the Bills of Sale Act, it is only necessary to refer to it to shew that this instrument is not within the enacting words of s. 1. It has, however, been urged that it comes within the description of instruments in the interpretation clause, s. 7. It is said that it is covered by the words "other assurances of personal chattels:" but, finding those words preceded by "assignments, transfers, and declarations of trust," and applying to the statute the ordinary rule of construction, it seems to me that the agreement in question is not ejusdem generis with those with which the words relied on are associated, and therefore that it is not within them. Then it was said that Holledge should have taken possession of the materials. I have already disposed of that

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by saying that this agreement does not operate as a mere licence to take possession, in which case possibly it would have been within the Bills of Sale Act, but that it creates an equitable interest in Holledge, which could not be defeated by the claim of the execution-creditor. The rule must be absolute.

KEATING, J. I am of the same opinion. The rule calls upon the plaintiff to shew cause why the verdict should not be reduced by the sum of 45*l.*, the value of certain building materials which had been brought by Hargreaves, the execution-debtor, upon the premises where they were seized by the sheriff. The terms of the seventh and eighth clauses of the agreement, upon which the question turns, are quite consistent, and clearly explain the intention of the parties. The general scope of the agreement was this: Holledge was possessed of land upon which Hargreaves was to build certain houses, which when built were to be demised to the latter at certain yearly rents. Meanwhile Holledge was to make advances to Hargreaves to enable him to complete the houses, and required to have some security for the repayment of such advances; and therefore it is provided by the seventh article that all materials which shall have been brought upon the premises by Hargreaves for the purpose of erecting such buildings, shall be considered as immediately attached and belonging to the premises, and that no part thereof shall be removed therefrom without Holledge's consent. But, as it might happen that Hargreaves would be unable or unwilling to complete his agreement, the eighth clause goes on to provide that, in that event, it shall be lawful for Holledge, his heirs or assigns, to enter into and take possession of the whole or any part of the land not leased, with all buildings and all bricks and other building materials standing and being thereon, for his and their own absolute use and benefit. The question is, what rights does that instrument create? It is unnecessary, in the view the Court takes of it, to consider whether the effect of the seventh clause was to give Holledge a legal interest in the materials before default made by Hargreaves. If the decision of the case had turned upon that, I should have desired time to consider. But I entirely agree with my Lord that it creates such an equitable right in Holledge as to prevent the materials from being

available to satisfy an execution against Hargreaves. In *Reeve* v. *Whitmore* (1), Lord Westbury, with that clearness and perspicuity which so much distinguish him, explains the distinction between a mere power to seize and the creation of an interest which will give an equitable claim to a chattel. Applying that rule here, if the seventh clause gave Holledge a mere right to seize the materials in question, equity would not give effect to it; but, if it created an interest in Holledge's favour, a court of equity would (although a court of law would not hold the property to pass) consider it as an equitable charge. I therefore think the seventh clause of this agreement has produced the effect contended for on the part of the defendant, and that the materials in question were not available for satisfaction of the plaintiff's execution. The verdict must, therefore, be reduced by the sum of 45*l.*, unless the non-compliance with the requirements of the Bills of Sale Act renders this instrument void. For the reasons given by my Lord, in which I entirely concur, I think this was not a conveyance or assurance within the contemplation of that act. The agreement therefore must have full effect, and this rule must be made absolute.

MONTAGUE SMITH, J. I am of the same opinion. This is a mere question of damages; and I agree with my Lord and my Brother Keating that the plaintiff is not entitled to recover damages in respect of the materials which were brought upon the premises by Hargreaves under the agreement of the 28th of September, 1865. If the question had been whether or not the defendant was entitled to judgment, we might have been driven to the consideration of the legal rights of the parties. But, this being a mere question of damages, I am of opinion that the plaintiff is not entitled to recover in respect of these goods. Whatever might be the legal effect of the contract, I think it created such an interest in the goods in equity in Holledge as was sufficient to prevent the sheriff from selling them under the execution against Hargreaves. The legal interest in the land remained in Holledge, subject to a right in Hargreaves to have leases granted to him as the houses should be erected and finished. Advances were from time to time to be made by Holledge: and it was agreed that the

(1) 33 L. J. (Ch.) 63; 9 Jur. N. S. 1214; 4 Law J. L. C. L.

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materials brought upon the premises for the purpose of erecting the buildings should be considered as immediately attached to and belonging to the premises, and should not be removed therefrom without Holledge's consent. Apart from all technical considerations, there could be no doubt as to the substantial meaning of the parties. Is, then, the contract one which equity would enforce? I am clearly of opinion that it is. It was not a mere power to enter and take the materials; but a distinct agreement that they shall be considered as attached to and belonging to the premises. I think the bringing the materials upon the land under such an agreement as that amounts to the same thing as if they had been brought there, and then an agreement made that they should be considered as part of the land. It must be assumed that these things were brought upon the land for the purpose of being used in the erection of the buildings. Hargreaves himself could not have appropriated them to any other purpose; neither, I think, could the sheriff. It may be a question whether under this agreement Hargreaves took any interest at all in the land. It may be that he was a mere tenant at will. (1) The distinction between a mere licence to take possession and the creation of an interest is well pointed out in two of the cases which have been referred to, viz. *Carr* v. *Allatt* (2) and *Reeve* v. *Whitmore*. (3) Wherever there is a clear indication of intention to pass an interest, the Court will so construe the instrument as to give effect to that intention. As to the argument founded upon the Bills of Sale Act, I am of opinion that the contract being in effect to attach to land, gave the landlord an interest in equity which cannot be affected by that act.

Rule absolute.

Attorney for plaintiffs: *H. Parry.*

Attorneys for defendant: *Abbott, Jenkins, & Abbott.*

(1) See *Marquis of Camden* v. *Batterbury*, 5 C. B. (N.S.) 808; in error, 7 C. B. (N.S.) 864.

(2) 27 L. J. (Ex.) 385.

(3) 33 L. J. (Ch.) 63.

BERRESFORD AND ANOTHER *v.* GEDDES. 1867 *Jan.* 29.

Practice—Notice of Trial, before Issue complete—Waiver of Irregularity—Discontinuance—Statute of Jeofails, 32 *Hen.* 8, *c.* 30.

To a declaration containing two counts, the defendant pleaded three pleas to the first count, and a fourth plea to the second. Issue was joined on the pleas to the first count, and there was a special replication to the fourth plea. Notice of trial was given; and the defendant obtained a rule for a special jury, and the jury was duly nominated, reduced, and summoned; but, when the cause came on for trial, it was discovered that no issue had been joined on the replication to the fourth plea. Before the jury were sworn the judge, upon the application of the plaintiffs (without summons), amended the record by striking out the second count; and, the defendant declining to appear, the plaintiffs obtained a verdict. Upon a motion to set aside the verdict for irregularity, on the grounds that there had been no sufficient notice of trial, and that there had been a discontinuance:—

Held, that the notice of trial was effectual as to the first count; and the trial valid. That the defendant had waived any irregularity in the notice; and that there was no discontinuance.

Semble, that the defect in the record, even if it had not been amended, would have been cured, after verdict, by the Statute of Jeofails, 32 Hen. 8, c. 30.

THIS was an action brought to recover an amount paid by the plaintiffs to the London and St. Katherine Dock Company for charges on certain goods of the plaintiffs, which they alleged were incurred by reason of the defendant's having improperly landed the goods from his ship on to the quay of the docks, instead of discharging them into the plaintiffs' lighters.

The declaration,—which contained a special count founded on the 67th section of the Merchant Shipping Amendment Act, 1862, 25 & 26 Vict. c. 63, and also a count for money paid,—was delivered on the 17th of March, 1866, and the defendant on the 30th of April pleaded three pleas to the first count, and a fourth plea to the second count. The plaintiffs on the 25th of May took and joined issue on all the pleas, and pleaded a second special replication to the fourth plea, and delivered a paper purporting to be an issue, with a notice of trial, but such paper contained no joinder of issue on the special replication to the fourth plea.

On the cause being called on for trial at the sittings in London after last Michaelmas Term, the plaintiffs' counsel applied to Bovill, C.J., to amend the record, either by adding a joinder in

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issue to the second replication to the fourth plea, or by striking out the second count. The proposed amendment was objected to on the part of the defendant, his counsel assigning as his reason for opposing it that he wanted the mate of the defendant's vessel (who was then abroad) to be personally examined as a witness. This witness had been examined upon interrogatories before leaving England, and therefore a postponement of the trial could not be asked for in the ordinary course.

The Lord Chief Justice allowed the amendment, striking out the second count; whereupon the defendant's counsel withdrew, and the trial proceeded without any one appearing for him; and a verdict was taken for the plaintiffs.

Jan. 16. *Sir G. Honyman, Q.C.*, obtained a rule nisi to set aside the verdict and subsequent proceedings, for irregularity, on the grounds that no sufficient notice of trial had been given, and that there had been a discontinuance of the action.

Jan. 29. *J. Brown, Q.C.*, and *F. M. White*, shewed cause, upon an affidavit which stated that on the 12th of April, 1866, the defendant obtained an order for time to plead, on the terms of pleading issuably and rejoining gratis; that notice of trial was given for the sittings after Trinity Term last; that, after the record was entered for trial, the defendant's attorneys obtained a rule for a special jury, which had the effect of making the cause a remanet till the sittings after Michaelmas Term, and a special jury was accordingly nominated, reduced, and summoned; that, on the 13th of December, 1866, the defendant's attorneys signed certain admissions, and gave an undertaking as attorneys for the defendant to produce certain documents on the trial of the cause; that the cause was in the paper for trial on the 17th, 18th, and 19th of December; that, shortly before the cause was called on, the defendant's attorneys for the first time intimated that the issue was not complete; that, although the defendant's attorneys, counsel, and witnesses were in attendance during the whole time the cause was in the paper, he refused to proceed with his defence; and that the defendant might have raised his defence to the action on the pleas on which issue was joined. The irregularity, if any, was that of the defendant himself; and it has been waived. The issues were substantially

the same on both counts; and there was a complete issue joined on the pleas to the first count. The rule for a special jury could only be obtained upon an affidavit that issue had been joined.

[WILLES, J. The objection, if any, is to what was done by the Chief Justice. The application should have been addressed to that.

Sir G. Honyman, Q.C. There was no order in writing, and therefore nothing to appeal from.

BOVILL, C.J. If any suggestion of that sort had been made at the time, I would have issued a summons. In practice, however, it is not usual to adopt the strict course at nisi prius. We must look to the record.

WILLES, J. Even apart from that, is there any irregularity here? Has not the Court a right to direct the trial of one issue which is perfect?]

The order standing, there is a complete issue, trial, and verdict. The notice of trial was good per se; the only objection is that it was premature. If that be an irregularity, it is one which might be waived or an amendment made: *Doe* d. *Antrobus* v. *Jepson* (1); *Fraas* v. *Paravicini* (2); *Williams* v. *Williams* (3); *Farmer* v. *Mountfort* (4); *Sayer* v. *Pocock* (5); *Grundy* v. *Mell.* (6) In *Cooke* v. *Burke* (7), the cause went down to trial with an untraversed plea upon the record, and an amendment by adding a traverse was allowed. Then, if the irregularity may be, it clearly has been, waived here by the steps subsequently taken by the defendant, which assumed the cause to be at issue, viz. obtaining a rule for a special jury, and nominating and reducing them. Then, as to the alleged discontinuance, that is cured by the verdict. In 2 Ch. Arch. 11 ed. 1470, it is said: "Discontinuance is cured after verdict by the Statute of Jeofails, 32 H. 8, c. 30, and after judgment by nil dicit, confession, or non sum informatus, by 4 & 5 Ann. c. 16." In *Harvey* v. *Richards* (8), in an action of assumpsit on a bill of exchange, with the usual money counts, the defendant pleaded nil debet to the count on the bill, but did not plead at all to the other counts; and, after verdict for the plaintiff, it was held that the

(1) 3 B. & Ad. 402.
(2) 4 Taunt. 545.
(3) 2 Dowl. 350.
(4) 9 M. & W. 100.
(5) 1 Cowp. 407.
(6) 1 B. & P. (N.R.) 28.
(7) 5 Taunt. 164.
(8) 1 H. Bl. 644.

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defendant could not take advantage of his own mispleading in arrest of judgment.

Sir G. Honyman, Q.C., and *Watkin Williams*, in support of the rule. If the notice of trial was a bad notice at the time it was given, it was not competent to the judge by an amendment of the record to convert it into a good one. Assuming that there might have been several writs of venire facias,—though in the instance referred to in Com. Dig. Enquest (C. 1), *Cumberland* v. *Cumberland* (1), the issues arose *in several places*,—that course was not pursued here. The general rule stated in 1 Chit. Arch. 11 ed. 313, is, that notice of trial cannot be given until issue is joined. The 40th rule of Hilary Term, 1853, does not apply to the present case. A defect similar to this was held by the House of Lords in *Gwynne* v. *Burnell* (2) to render the whole trial a nullity.

[WILLES, J. The verdict passed here upon a complete issue.]

There was no complete issue joined at the time the notice of trial was given; and that defect is not cured by anything that has occurred since.

[BOVILL, C.J. If the defendant had appeared at the trial, that unquestionably would have cured the defect. What material difference in that respect can there be between appearing at the trial, and obtaining a rule for a special jury and taking all the steps necessary to their being summoned? In his affidavit the defendant treats the notice as having been properly given.]

In Lush's Practice, 3 ed. 494, it is said that a defective notice is not waived by the defendant's keeping it, and forbearing to object; and several authorities are cited in support of the proposition.

[WILLES, J. Might not a judge at chambers have struck out the count as to which no issue had been joined?]

No such application was made. As to the discontinuance, it must be conceded that the case of *Harvey* v. *Richards* (3) cannot be distinguished from the present.

BOVILL, C.J. In this case the record, when notice of trial was given, shewed a complete issue joined upon the first count of the declaration. There were incomplete issues on the second count. I should have been disposed to think, upon the authority of

(1) Hob. 37. (2) 6 Bing. N. C. 453. (3) 1 H. Bl. 644.

Harvey v. *Richards* (1), that the cause having proceeded to trial, and a verdict having passed in favour of the plaintiff upon the issue joined on the first count, the defect was cured by the Statute of Jeofails, 32 Hen. 8, c. 30. But I am of opinion that it is unnecessary upon the present occasion to consider that. Before the cause was called on, the defect having been discovered, an application was made to me to amend the record by striking out the second count. The defendant was at liberty to oppose that application upon any ground he could suggest. It was opposed: and, after hearing the parties, I came to the conclusion that the amendment should be allowed, and accordingly I struck out the second count. No summons issued, and no formal order in writing was made: but all the parties were before me, and no objection was made to the want of a summons; and no doubt it was competent to the defendant to appeal against my decision. No such course has been taken, probably because his counsel thought the order was properly made. The second count was wholly unnecessary: the record was perfect without it; and I am of opinion that there has been no discontinuance. If there were any irregularity, I think the conduct of the defendant, in obtaining a rule for a special jury upon an affidavit that issue had been joined, and taking the subsequent steps to procure the attendance of the jurymen, clearly amounted to a waiver. This rule must be discharged with costs.

WILLES, J. I am of the same opinion. The question seems to me to be an entirely new one; and we must decide it according to reasoning and analogy. The declaration contained two counts; as to one issue was joined, as to the other there was no complete issue. The cause proceeded to trial, and the plaintiffs obtained a verdict on the count upon which issue had been joined. The notice of trial was in terms applicable to all the issues; but, inasmuch as there was no issue joined on the second count, it was an effectual notice only as to the first count. There has, therefore, been a good trial of an issue properly joined, unless the fact of there having been another count upon the record as to which there was no perfect issue invalidates the verdict. If the second count

(1) 1 H. Bl. 644.

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had remained upon the record, my impression is that the defect would have been cured by the statute 32 Hen. 8, c. 30. Utile per inutile non vitiatur. The verdict ought not to be vitiated by matter which does not affect the merits. Apart from any amendment, therefore, I should have thought that the verdict ought to stand. Here, however, the pleadings relating to the second count were struck out before trial; and there was not, nor could there have been, any complaint as to the manner in which that was done. In strictness, no doubt, there should have been a summons. But no objection was taken on that score: and my Lord struck out the second count. I entirely agree with the defendant's counsel, that striking out the second count at the trial would not have the effect of making the trial on the first count valid, unless there had been a good notice of trial. The mere act of the judge in altering the record against the will of the defendant, could not have the effect of curing a bad notice. But I think the notice here was perfectly valid, notwithstanding there was a second count upon the record as to which no issue was joined. Under the old law, it is clear that, where there were several issues, there might have been several writs of venire. This appears from Com. Dig. Enquest (C. 1). There being an issue properly joined upon the record, the Court had power to cause that to be disposed of. The plaintiffs might have entered a nolle prosequi as to the second count: and the defendant could have sustained no prejudice; for, he knew that there could be no issue tried on the second count. If the course pursued by the plaintiffs had been calculated to harass the defendant, the Court would know how to deal with the matter; or the defendant might have applied to a judge at chambers to strike out the pleadings on the second count, or to compel the plaintiffs to enter a nolle prosequi as to that count. The defendant, however, did not take either of those courses; and, when the plaintiffs applied to the judge to amend the record by striking out the second count, he resisted it. I must confess I see nothing in the nature of the thing to make it incumbent on us to say that the notice of trial was bad as to the issue on the first count, because there were pleadings upon the record as to which no issue had been joined, and consequently none that could be tried. I think we are bound to hold that the proper remedy of the defendant was by an

application to the equitable discretion of a judge at chambers, rather than that the whole proceeding was void because there happened to be something upon the record which was idle and useless.

KEATING, J. I am of the same opinion. As the record stood at the time the notice of trial was given, it was competent to the defendant to have applied to a judge at chambers to set aside the notice, or to compel the plaintiffs to strike out the second count; and the judge would have taken care that the defendant sustained no prejudice. The defendant, however, did not do that; but he assumed, or led the plaintiffs to think he assumed, the notice to be a good one; and, when the application was made before the trial to do that which ought to have been done at an earlier stage, he appeared by counsel to oppose it. If my Lord had perceived that any hardship or injustice would have been inflicted upon the defendant by the proposed amendment, he would not have made the order. He thought injustice would have resulted from his refusal to do so. The want of a summons was cured by the appearance of the defendant, and cannot now be insisted on. Indeed, the order made by my Lord is not impeached by the rule. I think the rule should be discharged with costs.

MONTAGUE SMITH, J. I am of the same opinion. So far as it regarded the issues joined upon the first count of the declaration, the notice of trial was perfectly regular. The irregularity consisted in there being upon the record a count as to which there was no perfect issue. Being a mere irregularity, that ought to have been pointed out at an earlier stage, according to the 135th rule of Hilary Term, 1853. No application on that score having been made within a reasonable time, what else is there to complain of? The record being imperfect, my Lord was asked at the trial to amend it by striking out a useless count; and, in the proper exercise of his discretion, he yielded to the application. Terms might have been imposed if asked for. That which is now complained of was a mere irregularity, and has been waived.

Rule discharged with costs.

Attorneys for plaintiffs: *Jones & Arkcoll.*
Attorneys for defendant: *Ellis, Parker, & Clark.*

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Jan. 30.

BUDENBERG, APPELLANT; ROBERTS, RESPONDENT.

Appeals from Justices under 20 & 21 *Vict.* c. 43—*Costs, when to be applied for.*

The Court will not entertain an application for costs of an appeal against a decision of a magistrate under the 20 & 21 Vict. c. 43, in the term after that in which judgment is pronounced.

And *semble*, that the application for costs should be made immediately upon the disposal of the case.

THIS was a case stated by the stipendiary magistrate of Liverpool, pursuant to the 20 & 21 Vict. c. 43, for the purpose of taking the opinion of this Court upon the construction of the 6th and 8th sections of the Customs Amendment Act, 1859, 22 & 23 Vict. c. 37.

The case was argued on the 21st of June, 1866, when it was sent back to the magistrate for a more complete statement of his finding upon one point, viz. whether he was of opinion that the appellant had in fact caused the goods to be imported. (1) It was afterwards returned by the magistrate, with the following memorandum appended thereto: "In pursuance of the order of the Court of Common Pleas made in the above case, dated the 21st day of June, 1866, I do hereby further state that at the time of the conviction I was satisfied that Budenberg had caused the goods to be imported."

The Solicitor General thereupon, on the 16th of November, 1866, prayed judgment for the respondent; and the Court gave judgment accordingly, but nothing was said about costs.

Locke, Q.C., for the respondent (January 30), prayed for costs. He referred to the 6th section of the statute, which places the costs at the discretion of the Court; and stated that the invariable practice in the Court of Queen's Bench is, that the costs follow as of course on the affirmance of the magistrate's decision.

[WILLES, J. In *Schroder* v. *Ward* (2) this Court held that costs on appeals from the county courts (or Sheriffs' Court, London,) will

(1) Law Rep. 1 C. P. 575.
(2) 13 C. B. (N.S.) 410; 32 L. J. (C.P.) 150.

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always be allowed to the successful party, unless there be something very exceptional in the circumstances. A similar rule has been adopted with regard to the respondent's costs on the dismissal of an appeal against a decision of justices: but in *Caswell* v. *Cook* (1) the Court declined to listen to an application for costs in the term after the decision.]

This clearly was a case in which the costs would have been granted if the counsel for the respondent, relying upon the practice of the other courts, had not abstained from asking for costs.

Holker, who appeared to shew cause in the first instance, was not called upon.

BOVILL, C.J. I see no reason for departing in this case from the wholesome rule laid down in *Caswell* v. *Cook*. (1)

The rest of the Court concurred.

Rule refused.

Holker asked for the appellant's costs of appearing to oppose the present application. But the Court refused to grant them.

No rule.

Attorneys for appellant: *Gregory, Rowcliffes, & Rawle.*
Attorney for respondent: *The Solicitor of the Customs.*

STEWART *v.* SMITH AND ANOTHER.

Jan. 30.

Interrogatories — Common Law Procedure Act, 1854, *s.* 51.

Interrogatories under the 51st section of the Common Law Procedure Act, 1854, will not be allowed where they relate wholly to matter which tends to support the case of the opposite party.

In an action for a malicious prosecution on a charge of stealing books, the Court allowed interrogatories requiring the plaintiff to state whether or not certain books described were in his possession, and when, where, and from whom, he bought them, and the price he paid for them.

THIS was an action for a malicious prosecution. The plaintiff, who was a wheelwright at the railway company's works at Stratford, was charged by the defendants with having stolen a number

(1) 12 C. B. (N.S.) 242.

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of books from their book-stall at the station there, but was acquitted. He thereupon brought this action.

The defendants took out a summons for leave to administer to the plaintiff, under the 51st section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), the following interrogatories:—

"1. Had you not, on the 14th of December, 1866, in and upon your dwelling-house, No. 16, Widdington Place, Windmill Hill, West Ham, or at your place of employment, the books commonly called or known by the names mentioned in the following list [setting out a list of books, fifty-five in number, which the plaintiff had been charged with having stolen from the defendants' book-stall at the Stratford Railway Station]? State which of such books were at your dwelling-house, and which at your place of employment.

"2. Had you not two or more copies of some of the said books? If so, state which of the said books.

"3. State the times when, and places where, and persons from whom, you obtained such books respectively: and, if you allege that you purchased the same or any of them, state the prices which you paid for the same respectively.

"4. Are such books now in your possession? If not, what has become of the same?"

The summons came on before Byles, J., but he declined to make any order.

Philbrick moved for a rule in the terms of the summons. The affidavit upon which the application was founded set out a letter which the defendants' attorneys had on the 9th instant received from the plaintiff's attorneys, which contained the following paragraph:—"Mr. Stewart is quite ready and anxious to place his position before a jury, and state upon oath (which hitherto he has been debarred from doing) in what manner he purchased and obtained the books: and we have little doubt of a successful issue." He referred to *Zychlinski* v. *Maltby*. (1) That was an action for a malicious prosecution of the plaintiff upon a charge of having obtained money from the defendant by false and fraudu-

(1) 10 C. B. (N.S.) 838.

lent pretences; the alleged false pretences consisting of representations made by the plaintiff that he had disbursed sums for the defendant's wife and daughters at Rome and at Paris: and the following amongst other interrogatories were allowed:—"5. Did you pay any and what sum or sums of money at Rome for or on account of the said Mrs. M.? And, if so, state particularly all the sums which you so paid, and to whom respectively, and when. 10. Did you make any and what payment or payments for or on account of the said Mrs. M. at Paris, or on the journey from Rome to Paris, or on the journey from Paris to England? And, if so, state particularly the sum or sums you so paid, and on what account, and when." The general conclusion to which the Court came was that interrogatories will be allowed which are relevant to the matter in issue, and which the party interrogated would be bound to answer if in the witness-box. The interrogatories proposed to be administered here are clearly within the principle there laid down. Their object is to shew that the books referred to were the property of the defendants.

Francis shewed cause in the first instance. These interrogatories are clearly not such as the plaintiff ought to be called upon to answer. It will be for the plaintiff to make out his case at the trial by shewing how he became possessed of the books. The matters sought to be inquired into by the first and second interrogatories could be ascertained from the policeman who assisted in getting up the charge against the plaintiff: and, suppose the answer to the third to be that the books were purchased from the man at the stall, how would that support the defendants' case?

BOVILL, C.J. The case of *Zychlinski* v. *Maltby* (1) seems to me, as to some of the interrogatories there, more especially the fifth and tenth, to be precisely in point. I therefore think all the proposed interrogatories should be allowed, the costs on both sides to be costs in the cause.

MONTAGUE SMITH, J. I also think these interrogatories ought to be allowed. But I would add that we do not intend in any way to infringe the rule that interrogatories are not to be allowed

(1) 10 C. B. (N.S.) 838.

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where they relate wholly to matter which tends to support the case of the opposite party.

WILLES, J. I concur in the observation of my Brother Montague Smith.

Rule absolute.

Attorneys for plaintiff: *Lewis & Whitbourne.*
Attorneys for defendants: *Rogerson & Ford.*

Jan. 30.

JEWELL *v.* CHRISTIE AND OTHERS.

Arbitration—Award, Finality of; Silence of, as to one of the Matters in Difference brought to the Notice of the Arbitrator.

By order of nisi prius a cause and all matters in difference between the parties were referred to an arbitrator. By his award, which professed to be "of and concerning all the matters referred to me in the cause and under the order," the arbitrator, having disposed of the issues in the cause, proceeded as follows:—"And as to the matter concerning two bills of exchange," &c., "I award that the defendants have no further claim to the said bills, and that they be cancelled;" and he then provided for the costs.

Held, that the award sufficiently disposed of all the matters in difference, though a cross-claim by the defendants in respect of goods supplied to the plaintiff, which it was sworn had been brought to the notice of the arbitrator, was not *specifically* disposed of.

BY ORDER of nisi prius a cause and all matters in difference between the parties were referred to an arbitrator to award or certify thereon; the costs to be in his discretion.

The arbitrator made his award, after reciting the order, as follows:—"Now, I, the said arbitrator, having taken upon myself the burthen of the said reference, and having duly weighed and considered the various allegations of the parties, the arguments of their counsel, and the proofs, vouchers, and documents which have been given in evidence before me, do hereby make and publish my award in writing *of and concerning all the matters referred to me in the cause and under the said order*, as follows": (after disposing of the issues),—"And, as to the matter concerning two certain bills of exchange for the sums of 150*l.* each, drawn by Christie & Co. per Thomas Fleming, and accepted by James Jewell (the defen-

dant), now overdue but remaining unpaid, I award that the defendants have no further claim to the said bills; and I further order that they be cancelled and delivered up to the attorney of the plaintiff." The award then provided for the costs.

Philbrick (Nov. 24, 1866) obtained a rule nisi to set aside or refer back the award to the arbitrator, on the ground that, though complete on the face of it, it did not dispose of all the matters which were brought before the arbitrator. The affidavit upon which the motion was founded alleged that a matter in dispute was brought before the arbitrator, founded upon an agreement between the plaintiff and the defendant Christie for the purchase by the plaintiff of an hotel at Liverpool, and a claim on the part of Christie for certain wines and spirits which had been supplied thereto by him, and that the arbitrator had altogether omitted to adjudicate thereon.

R. G. Williams (Jan. 30) shewed cause, upon an affidavit stating that evidence was given on the part of the plaintiff before the arbitrator that the defendants' claim in respect of the wines and spirits had been satisfied. The award professes to be "of and concerning all the matters referred" to the arbitrator "in the cause and under the said order." The Court will, therefore, assume that he has considered and disposed of everything. The general rule laid down in the notes to *Birks* v. *Trippett* (1), is, that, where an award professes to be made de præmissis, "even where there is no award of general releases, the silence of the award as to some of the matters submitted and brought before the arbitrator, does not per se prevent it from being a sufficient exercise of the authority vested in him by the submission. An award is good, notwithstanding the arbitrator has not made a distinct adjudication on each or any of the several distinct matters submitted to him, provided that it does not appear that he has excluded any." For this position the learned editor cites *Gray* v. *Gwennap* (2); *Hayllar* v. *Ellis* (3); *In Re Gillon and The Mersey and Clyde Navigation Company* (4); *Day* v. *Bonnin* (5); *In Re Brown and The Croydon Canal Company* (6); *Dunn* v.

(1) 1 Wms. Saund. 33 *a*.
(2) 1 B. & A. 106.
(3) 6 Bing. 225.
(4) 3 B. & Ad. 493.
(5) 3 Bing. N. C. 219.
(6) 9 Ad. & E. 522.

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Warlters (1); *Wyatt* v. *Curnell* (2); and the dictum of Gibbs, C.J., in *Craven* v. *Craven*. (3) In *Harrison* v. *Creswick* (4), a cause and all matters in difference between the parties were referred to a barrister. A cross-claim was urged on the part of the defendant before the arbitrator. The arbitrator, professing to make his award "of and concerning the said several premises so referred as aforesaid," after disposing of all the issues in favour of the plaintiff, directed the defendant to pay a gross sum to the plaintiff, apportioned the costs of the reference and award, and, on payment thereof, directed that the plaintiff should execute and deliver to the defendant a general release; but nothing was said in respect of the cross-claim. It was held by the Exchequer Chamber (affirming the judgment of this Court) that the award was nevertheless final; for that it must be intended from the silence of the arbitrator upon the subject, that he had negatived the cross-claim. In giving judgment, Parke, B., says (5): "Where an award is made de præmissis, the presumption is that the arbitrator intended to dispose finally of all the matters in difference; and his award will be held final, if by any intendment it can be made so. The rule is this:—Where there is a further claim made by the plaintiff, or a cross-demand set up by the defendant, and the award, professing to be made of and concerning the matters referred, is silent respecting such further claim or cross-demand, the award amounts to an adjudication that the plaintiff has no such further claim, or that the defendant's cross-demand is untenable: but, where the matter so set up from its nature requires to be specifically adjudicated upon, mere silence will not do." The case of *Duke of Beaufort and Swansea Harbour Trustees* (6), is also an authority to shew that the silence of the arbitrator upon a particular claim will not render the award bad, where it appears inferentially that the whole of the matters referred to him have been taken into his consideration.

[BOVILL, C.J. The arbitrator in the first part of his award

(1) 9 M. & W. 293.
(2) 1 Dowl. (N.S.) 327.
(3) 7 Taunt. 644.
(4) 13 C. B. 399; 21 L. J. (C.P.) 113, 6 Jur. (N.S.) 979
(5) 13 C. B. at p. 416; 21 L. J. (C.P.) at p. 116.
(6) 8 C. B. (N.S.) 146; 29 L. J. (C.P.) 241.

disposes of the action alone. That part in which he professes to deal with that which is dehors the cause, commences "And as to *the matter concerning two certain bills of exchange,* I award," &c. Do any of the cases shew a specific introduction of a single matter like that, where the award has been upheld, it being shewn that there were other matters contested before him?

WILLES, J. If the arbitrator had said at the end of the award, "I have thus disposed of all the matters referred to me," that would clearly have been enough. Can it make any difference that these words are found at the beginning?]

Philbrick, in support of the rule. Although the arbitrator at the beginning of his award says "as to all the matters referred," it is manifest from the subsequent part that the only matter dehors the cause which he has really disposed of is that which related to the two bills of exchange. He makes no mention at all of the defendant's claim in respect of the wines and spirits, which the affidavits shew to have been a matter contested before him.

[MONTAGUE SMITH, J. If the rule laid down by Parke, B., in *Harrison* v. *Creswick* (1) does not apply to this case, where will it apply?]

This case falls within the exception there mentioned, viz. that, "where the matter so set up from its nature requires to be specifically adjudicated upon, mere silence will not do." In that case, too, the arbitrator directed that the plaintiff should execute and deliver to the defendant a general release; and, in arriving at the gross sum which he directed the defendant to pay to the plaintiff, he clearly must have considered the cross-claim. Here, there is nothing to warrant the inference that the arbitrator has considered anything but the matter as to which he has specifically awarded. *Mitchell* v. *Staveley* (2) is precisely in point. There, to debt on bond conditioned to perform an award, under a reference of *all matters in difference between the parties,* it was held to be a good plea that at the time of the submission certain negotiable bills of exchange drawn by the defendant and accepted by the plaintiff were then outstanding, and that an indemnity of the defendant against such bills was a matter in difference between

(1) 13 C. B. at p. 416; 21 L. J. (C.P.) at p. 116. (2) 16 East, 58.

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JEWELL v. CHRISTIE.

the parties, which was notified to the arbitrators before the award was made, and that they made no award concerning it,—though it appeared by the award set forth that the arbitrators stated therein that they had heard the allegations of the parties, and examined all the accounts, bills of exchange, &c., and all other evidence and proofs produced to them touching the matters in difference, and awarded of and concerning the same that the defendant should pay to the plaintiff 1500*l.* in full of all claims and demands upon him, &c., and so proceeded to award concerning other specific matters, but without mentioning such outstanding bills, or any indemnity concerning the same.

BOVILL, C.J. The award in this case professes to be made "of and concerning all the matters referred to the arbitrator in the cause and under the order." The presumption therefore is, that the arbitrator intended by what he has done to dispose of, and has in fact disposed of, all the matters which came before him. It is not unusual to go on and say that there was no other claim or matter in difference between the parties than those mentioned. But, upon the authorities, and especially upon the case of *Harrison* v. *Creswick* (1), I am of opinion that this award does sufficiently dispose of all the matters which were brought to the notice of the arbitrator. I therefore think the rule should be discharged.

WILLES, J. I am of the same opinion. If a specific finding as to every matter in dispute were necessary to lead to the settlement of the litigation between the parties, as, if each were the subject of a distinct suit, or it was necessary for the proper taxation of the costs to distinguish what should be paid by the unsuccessful party and what not, it would fall within Baron Parke's exception, and each should be mentioned. But, as no such consequence could follow here, I think it sufficiently appears upon the face of the award that the arbitrator has disposed of all the matters submitted to him. It is to be implied that neither party had any further claim against the other upon which it was necessary to adjudicate. I therefore think the award is not open to the objection urged against it.

(1) 13 C. B. 399; 21 L. J. (C.P.) 113.

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MONTAGUE SMITH, J. I am of the same opinion. The objection now made appears by a series of cases not to be a substantial one. The rule laid down in the notes to *Birks* v. *Trippett* (1) is, that, "even where there is no award of general releases, the silence of the award as to some of the matters submitted and brought before the arbitrator, does not per se prevent it from being a sufficient exercise of the authority vested in him by the submission. An award is good, notwithstanding the arbitrator has not made a distinct adjudication on each or any of the several matters submitted to him, provided that it does not appear that he has excluded any." That rule was acted upon by the court of error in *Harrison* v. *Creswick* (2); and probably that case was taken to the Exchequer Chamber in consequence of doubts which were entertained as to the doctrine in *Birks* v. *Trippett*. (1) The Court, however, affirmed it. In the present case, the award professes to be made of and concerning all the matters referred in the cause or under the order. That to my mind is equivalent to a declaration that there were no matters in difference either in the cause or under the order other than those specifically disposed of. If the rule so laid down does not apply here, I am at a loss to see to what case it could apply. There was nothing in controversy here but a mere money demand.

Rule discharged.

Attorneys for plaintiff: *Johnson & Weatheralls, for Grocott, Liverpool.*

Attorneys for defendants: *Sweeting & Lydall, for Samuel, Liverpool.*

(1) 1 Wms. Saund. 33 *a*. (2) 13 C. B. 399; 21 L. J. (C.P.) 113.

1867
Feb. 4.

[IN THE EXCHEQUER CHAMBER.]

KAY AND ANOTHER *v.* WHEELER AND ANOTHER.

Ship and Shipping—Bill of Lading—Perils of Navigation—Rats.

Goods were shipped under a bill of lading containing the usual exceptions of "the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the sea, rivers, and navigation, of what kind and nature soever." The goods were injured during the voyage by rats, though the shipowner had taken all possible precaution to prevent it:—

Held, that the cause of injury did not come within the exception, and that the shipowner was liable.

ERROR from the Court of Common Pleas.

This was a special case, stated without pleadings, pursuant to the 46th section of the Common Law Procedure Act, 1852.

The defendants were the owners of a ship, the *Victoria*, and in November, 1863, Messrs. Wilson, Ritchie, & Co., shipped on board that ship 412 bags of coffee for carriage from Colombo to London, under a bill of lading in the usual form, and containing the usual exceptions, "the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the seas, rivers, and navigation, of what nature and kind soever, excepted." The plaintiffs were the consignees named in the bill of lading. The *Victoria* arrived in London in April, 1864; and upon the coffee being discharged it was found that a portion of the bags had been gnawed by rats during the voyage, and the contents partly eaten and damaged by them. The ship had on board during the time she was at and on leaving Colombo two cats and two mangoose, a species of Cingalese ferret, very destructive to rats; and also, before leaving London for Ceylon, a professed rat-killer was employed by the defendants to clear the ship of vermin, and he cleared the ship of rats; and every possible precaution was taken to keep rats out of the ship from the time she left until her return to London. The question for the Court was, whether the defendants were, under the circumstances, liable for the damage. The Court gave judgment for the plaintiffs, and the defendants brought error.

Watkin Williams, for the defendants. The Court below considered themselves bound by *Laveroni* v. *Drury*. (1) In that case, however, it was assumed that the defendants might have prevented the mischief by proper care; in the present case it is to be taken that the defendants used every possible means to prevent the injury to the goods. It was also assumed in that case that the owner of a general ship was a common carrier, and therefore liable, though not guilty of any negligence. There is, however, no ground for such a contention. It is difficult to give an accurate definition of a common carrier, but it does not include every person who carries for hire, but only such as habitually carry from one place to another, and offer to take any goods of the public that are tendered to them with reasonable hire. *Brind* v. *Dale* (2) is an authority that the owner of a van carrying goods for hire, but not plying from place to place, is not a common carrier; and in *Benett* v. *Peninsular and Oriental Steamboat Company* (3) it was left undecided whether a ship trading with goods to a foreign port could be subject to the custom of the realm respecting common carriers. In the case of *Dale* v. *Hall* (4), on the authority of which *Laveroni* v. *Drury* was decided, the defendants were common carriers, which distinguishes it from the present case.

[KELLY, C.B. In this case the defendants have entered into an express contract to deliver the goods in good condition, except in the four specified cases; and they are therefore liable unless the injury arose from one of the causes so excepted.]

It is within the exception of "perils of navigation." Any danger during the voyage which cannot be provided against is a peril of navigation; if it can be provided against, it is the result of negligence, and is not therefore a peril of navigation. In policies of insurance there is an exception, almost identical with that in the present case; and Emerigon, c. 12, s. 1, par. 1, says, "By peril of the sea is understood in general every damage which happens *on the sea* to the subject insured, saving the modifications which the ordonnance or the agreements of the parties attach to the rule." In s. 4, par. 7, he expressly mentions rats as a peril of the sea, unless their existence be due to the negligence of the master.

(1) 8 Ex. 166; 22 L. J. (Ex.) 2.
(2) 2 Mood. & Rob. 80.
(3) 6 C. B. 775; 18 L. J. (C.P.) 85.
(4) 1 Wils. 281.

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In Abbot on Shipping, 10th ed. p. 278, the same rule is laid down. In Kent's Commentaries, vol. iii. p. 300, it is said: "It has even been a vexed question whether damage done to a ship by rats was among the casualties comprehended under perils of the sea, and the authorities are much divided on the question. The better opinion would, however, seem to be that the insurer is not liable for this sort of damage, because it arises from the negligence of the common carrier, and it may be prevented by due care, and is within the control of human prudence and sagacity." This is really in the defendants' favour, because he states that the reason why rats are not a peril of the sea is, that injury from them could be prevented, implying that if it could not they would be.

[LUSH, J. My difficulty is, that we have no means of knowing what was the cause of the rats being there. It may have been something in the nature of the timber of which the ship was built, or some other cause wholly disconnected with the sea or the voyage.]

The books expressly state that rats are a peril of the sea, except when they can be provided against; the special case here finds that they could not be provided against.

Sir G. Honyman, Q.C., for the plaintiffs, was not called upon.

KELLY, C.B. It is unnecessary for us to say whether the owner of a ship trading between a foreign and an English port is liable to all the responsibilities of a common carrier, and we need not therefore decide whether *Laveroni* v. *Drury* (1) is right in that respect. The question we have to determine depends on the contract between the parties contained in the bill of lading. That, after stating that certain goods have been shipped in good order and condition, binds the defendants to deliver them in like good order and condition, except in four cases. It has been contended that the present case comes within one of those exceptions, and that damage caused by rats would be within the words "all and every other dangers and accidents of the seas, rivers, and navigation, of whatever nature and kind soever." To shew this, authorities have been cited, which were also referred to in the learned argument in *Laveroni* v. *Drury* (1), but all the doctrine of those

(1) 8 Ex. 166; 22 L. J. (Ex.) 2.

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authorities has reference to policies of insurance, which contained words very much wider than those in the contract now in question. We have therefore only to look at the document before us. The defendants have delivered the goods in a very different condition from that in which they received them, and have therefore broken their contract; and, without any reference to *Laveroni* v. *Drury* (1), or other authorities, we are of opinion that the plaintiffs are entitled to recover.

CHANNELL, B., MELLOR, J., PIGOTT, B., and LUSH, J., concurred.

Judgment affirmed.

Attorneys for plaintiffs: *Johnston, Farquhar, & Leech.*
Attorneys for defendants: *Cotterill & Sons.*

GERARD *v.* LEWIS.

Feb. 6.

Debtor and Creditor—Deed—Assignment of Debts—Implied Covenant of Assignor not to do any Act in Derogation of his Deed.

A. and B. by deed assigned to C. "all and singular the debts due and owing by the parties named in the schedule hereunder written to A. and B.," with power to C. to sue in the names of A. and B. C. having brought an action in the names of A. and B. against a debtor whose debt was stated in the schedule to be 250*l.*, and having obtained a capias to hold him to bail, A. caused the sheriff to discharge the debtor. In an action against A. upon the implied covenant in the deed that he would do no act in derogation of his grant, A. pleaded that the debtor was, without his knowledge or consent, wrongfully and unlawfully held to bail for a much larger amount than was then owing by him to A. and B., and for a much larger amount than the sum of 250*l.* mentioned in the schedule as due from him; therefore the defendant ordered him to be discharged:—

Held, no answer to the action.

THE declaration stated that the defendant and one W. Bromham were co-partners, and carried on business as ship-brokers in such co-partnership, and that thereupon a certain deed was duly made by and between Bromham and the defendant of the one part and the plaintiff of the other part, and duly sealed, &c., and having a certain schedule thereto annexed, which deed and schedule were

(1) 8 Ex. 166; 22 L. J. (Ex.) 2.

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in the words and figures following, that is to say [The deed and schedule were set out: the deed, reciting that Bromham and Lewis were indebted to the plaintiff in a large sum, assigned to the latter "all and singular the debts due and owing by the parties named in the schedule hereunder written to Bromham and Lewis or either of them, and the securities for the same, together with full power and authority, in the name or names of the said W. Bromham and W. Lewis, or either of them, their or either of their executors or administrators, to ask, demand, sue for, recover, and receive, arbitrate, or compound the said debts, or any of them," &c.: and in the schedule appeared the name of E. M. Hullman as a debtor for 250*l.*]. The declaration then alleged that the plaintiff in accordance with the provisions of the deed commenced an action in the Common Pleas against Hullman, in the names of Bromham and Lewis as nominal plaintiffs, for the recovery of the debt in the schedule mentioned; and that such proceedings were thereupon had that the plaintiff obtained an order of Bramwell, B., to hold Hullman to bail in the said action, upon an affidavit of Bromham and another, stating among other things that there was probable cause for believing that Hullman was about to quit England unless forthwith apprehended, and that Hullman was duly arrested upon such order, and was held to bail in such action by the sheriff of Middlesex: Averment, that all conditions were fulfilled, &c., to entitle the plaintiff to maintain the action: Breach, that the defendant, after the arrest of Hullman, and after the execution of the deed by the defendant, and while Hullman remained in the custody of the sheriff of Middlesex as aforesaid, wrongfully and contrary to the said deed, and without the consent and against the will of the plaintiff, and in collusion with Hullman, in the name of himself and Bromham, the nominal plaintiffs in the action, but without the knowledge or consent of Bromham, ordered the sheriff to discharge Hullman out of his custody, and the sheriff accordingly discharged Hullman out of his custody without Hullman having given bail to or made deposit with the sheriff according to law in the said action, and without Hullman having paid, satisfied, or discharged the amount of the debt in the said action; and that Hullman, upon his discharge from custody as aforesaid, forthwith and before the commencement of this suit, left this country and

went out of the jurisdiction of the Court of Common Pleas to parts beyond the seas, and will not return for a long time; and that Hullman had not at the commencement of this suit within the jurisdiction of the Court of Common Pleas any property to answer the amount of the said debt in the said action; and by reason of the premises the plaintiff had lost the amount of the debt of Hullman, and been wrongfully deprived by the defendant of the advantages he would otherwise have derived from the said action and arrest, and had been put to costs, &c.

Plea, that Hullman was arrested as in the declaration mentioned, and by the procurement of the plaintiff, and without the knowledge or consent of the defendant, was wrongfully and unlawfully held to bail for a much larger amount than was then owing by him to the defendant and Bromham, and for a much larger amount than the sum of 250*l.* mentioned in the schedule to the said deed as due from him; therefore the defendant ordered him to be discharged, as in the declaration mentioned.

Demurrer, on the ground that "the plea did not shew any justification for the release of Hullman by the defendant, a bare arrest for more than is due being no ground of action; and therefore that no liability was shewn on the part of the defendant to Hullman for the arrest." Joinder.

Mellish, Q.C. (*Robins* with him), in support of the demurrer. In a deed of assignment of debts, there is an implied covenant on the part of the assignor that he will not do anything in derogation of his deed. If authority were wanting for so self-evident a proposition, it is to be found in the case of *Aulton* v. *Atkins.* (1) Holding a person to bail for too much is not per se a cause of action: it becomes actionable only where it is done without reasonable or probable cause.

The Court called on

Macnamara, to support the plea. The holding the debtor to bail for a larger sum than was due from him was an unlawful act, and contrary to the statute 1 & 2 Vict. c. 110, s. 3, which only warrants the issuing of a capias for an amount not exceeding the amount of the debt. The exact sum due from Hullman being

(1) 18 C. B. 249; 25 L. J. (C.P.) 229.

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mentioned in the schedule, that unlawful act was knowingly done: and, the step having been taken in Lewis's name, he might have been held responsible for allowing the unlawful custody to continue: *Mitchell* v. *Jenkins*. (1)

[KEATING, J. Was it an unlawful custody?]

It was not warranted by the statute. The plaintiff may be said to have been the agent of Lewis, with a limited authority, viz. to take all reasonable and lawful means to obtain payment of the debts assigned. An act done by an agent in excess of his authority may be repudiated by his principal: *Bostock* v. *Jardine*. (2) In discharging Hullman, therefore, the defendant was guilty of no breach of his covenant, either express or implied; but was merely acting for his own protection against the consequences of an unjustifiable proceeding taken in his name.

[MONTAGUE SMITH, J. The assignment is not necessarily limited to the sums mentioned in the schedule. It is of "all and singular the debts due and owing by the parties named in the schedule hereunder written."

WILLES, J. The sums were not necessary to complete the schedule. The meaning is, that the debts assigned are severally estimated at so much.]

Taking the recital with the operative part of the deed, it is submitted that all that was intended to pass was, the debts as mentioned and specified in the schedule. If there was a greater sum than 250*l*. due from Hullman to Bromham and Lewis, the plaintiff should at all events have replied that. So, if the excess had been merely nominal, or it was a case of mistake.

[WILLES, J. You must go the length of saying that, if a writ is delivered to the sheriff, and the officer knows that the amount indorsed thereon is in excess of the debt really due, he may take upon himself to discharge the debtor.]

This is a case of *authority*. The arrest being for too much, the defendant could not discharge the debtor as to part. What, then, was he to do? If Hullman had brought an action against Lewis for causing him to be arrested without reasonable or probable cause, and the jury, as they might have done, had found malice, what answer would the defendant have had? No man is

(1) 5 B. & Ad. 588. (2) 3 H. & C. 700; 34 L. J. (Ex.) 142.

bound to lend the sanction of his name to an unlawful act to the prejudice of another.

WILLES, J. I am of opinion that our judgment ought to be for the plaintiff. The defendant appears to have joined his partner in assigning certain debts to the plaintiff, giving the plaintiff the ordinary power of attorney to sue in the name of the firm. The rule against assigning a chose in action stood in the way of an actual transfer of the debt, so as to enable the plaintiff to sue in his own name; and, therefore, it became necessary to give the power of attorney. But the intention of the parties in giving that power was to give the assignee the conduct and control of the litigation necessary for enforcing payment of the debts assigned. The defendant, therefore, who interfered to thwart or impede the remedy of the assignee under this deed, unquestionably broke the covenant implied from the words "with full power and authority in the name or names of Bromham and Lewis, or either of them, their or either of their executors, &c., to ask, demand, sue for, recover, &c., the said debts, or any of them." The declaration, therefore, is a good declaration. It states that, in accordance with the provisions of the deed, the plaintiff commenced an action against Hullman in the names of Bromham and Lewis, and obtained an order under the statute 1 & 2 Vict. c. 110, s. 3, to hold Hullman to bail, and that the now defendant stepped in, and ordered the sheriff to discharge him from custody, whereby the benefit of the assignment was lost. To this the defendant pleads that Hullman was arrested as in the declaration mentioned, and by the procurement of the plaintiff, and without the knowledge or consent of the defendant (which was unnecessary, inasmuch as the plaintiff was acting under a power of attorney), was wrongfully and unlawfully (which are mere words of vituperation, and amount to nothing, unless they shew a cause of action) held to bail for a much larger (how much larger is not stated) amount than the sum of 250*l.* mentioned in the schedule to the deed as due from him, and therefore the defendant discharged him. We may strike out the last averment, because the schedule is not referred to as a limitation. It simply stands, therefore, that the defendant discharged Hullman from custody because the plaintiff had arrested him for too much. Mr. Macna-

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mara has cited no authority, nor am I aware of any, to shew that because wrong has been done in this respect the debtor is entitled to be discharged. A judge at chambers would probably order his discharge on giving bail for the lesser amount really due. The mere mistake of the plaintiff, it may be to a small and inappreciable amount, clearly would not entitle the party to an absolute discharge. Authorities are not wanting as to writs of execution; but it is hardly necessary to refer to them. Where the writ is indorsed for too large an amount, the Court or a judge will not discharge the defendant or direct the sheriff to withdraw from possession, but will correct it as to the excess. Upon the whole, it appears to me that the defendant has been guilty of the breach of an implied covenant in the deed, and the plea shews no excuse.

KEATING, J. I also think the declaration is good and the plea bad. The whole foundation of Mr. Macnamara's argument is, that the custody of Hullman was unlawful if there was any excess. I am not aware of any such practice. On the contrary, I believe the law to be otherwise. I see no ground for saying that the defendant could be charged with a malicious arrest.

MONTAGUE SMITH, J., had gone to chambers.

Judgment for the plaintiff.

Attorneys for plaintiff: *J. T. & R. Gole.*
Attorneys for defendant: *Lewis, Munns, Nunn, & Longden.*

[IN THE EXCHEQUER CHAMBER.]

1867
Feb. 6.

INDERMAUR *v.* DAMES.

Negligence—Unfenced Hole on Defendant's Premises.

A gasfitter, having contracted to fix certain gas apparatus to the defendant's premises, sent his workman, the plaintiff, after the apparatus had been fixed and by appointment with the defendant, to see that it acted properly. The plaintiff, having for this purpose gone upon the defendant's premises, fell through an unfenced shaft in the floor, and was injured. It was proved that the premises were constructed in the manner usual in the defendant's business, that of a sugar refiner, but that the shaft could, when not in use, have been fenced without injury to the business:—

Held, affirming the decision of the Court below, that the plaintiff was not a mere volunteer, and was entitled to recover damages from the defendant for the injury which he had sustained.

APPEAL by the defendant against a decision of the Court of Common Pleas, discharging a rule obtained by the defendant to set aside a verdict for the plaintiff, and to enter a verdict for the defendant or a nonsuit.

The defendant was the owner of a sugar refinery, in an upper storey of which there was an unfenced shaft. The plaintiff was a journeyman gasfitter in the employ of one Duckham, who had contracted to fix two patent self-acting regulators to the defendant's gas-meter. Upon the completion of the work, Duckham made an appointment with the defendant to come in a day or two, or send one of his men, to see if the apparatus worked properly, and accordingly the plaintiff went by Duckham's directions on to the defendant's premises for that purpose, and fell through the shaft, and was injured. The facts are fully stated in the report of the case in the court below. (1)

Griffits (*Huddleston, Q.C.*, with him), for the defendant, contended that the work under the contract having been completed, the plaintiff was a mere licensee permitted to come on the premises by the defendant for the benefit of Duckham, whose work he had come to test; and that the defendant, therefore, was only bound to have his premises in the condition usual in his business.

Raymond (*Ballantine, Serjt.*, with him), contrà, was not called upon.

(1) Law Rep. 1 C. P. 274.

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KELLY, C.B. In this case we are of opinion that the verdict of the jury ought not to be set aside, nor the judgment of the Court below disturbed. The grounds of that decision are well stated by Willes, J., in delivering the judgment of the Court; after referring to the facts of the case, and the arguments that had been used, he proceeds: "We think that argument (that the plaintiff was a bare licensee) fails, because the capacity in which the plaintiff was there was that of a person on lawful business, in the course of fulfilling a contract, in which both the plaintiff and defendant had an interest, and not upon bare permission. No sound distinction was suggested between the case of the servant and the case of the employer, if the latter had thought proper to go in person; nor between the case of a person engaged in doing the work for the defendant pursuant to his employment, and that of a person testing the work for which he had stipulated with the defendant to be paid if it stood the test, whereby impliedly the workman was to be allowed an onstand to apply that test, and a reasonable opportunity of doing so. Any duty to enable the workman to do the work in safety seems equally to exist during the accessory employment of testing; and any duty to provide for the safety of the master-workman seems equally owing to the servant-workman whom he may lawfully send in his place."

The question has been raised whether the plaintiff at the time of the accident, and under the special circumstances of the case, was more than a mere volunteer: let us see what the case really was. The work had been done on Saturday, and at the conclusion of it an appointment was made for the plaintiff's employer or some other workman to come on the following Tuesday to see if the work was in proper order, and all the parts of it acting rightly. The plaintiff by his master's directions went for that purpose, and I own I do not see any distinction between the case of a workman going upon the premises to perform his employer's contract, and that of his going after the contract is completed, but for a purpose incidental to the contract, and so intimately connected with it, that few contracts are completed without a similar act being done. The plaintiff went under circumstances such as those last mentioned, and he comes, therefore, strictly within the language used by Willes, J., "a person on lawful business in the course of fulfilling

a contract in which both the plaintiff and defendant have an interest." What then is the duty imposed by law on the owner of these premises? They were used for the purpose of a sugar refinery, and it may very likely be true that such premises usually have holes in the floors of the different storeys, and that they are left without any fence or safeguard during the day while the work-people, who it may well be supposed are acquainted with the dangerous character of the premises, are about; but if a person occupying such premises enters into a contract, in the fulfilment of which workmen must come on the premises who probably do not know what is usual in such places, and are unacquainted with the danger they are likely to incur, is he not bound either to put up some fence or safeguard about the hole, or, if he does not, to give such workmen a reasonable notice that they must take care and avoid the danger? I think the law does impose such an obligation on him. That view was taken in the judgment in the court below, where it is said: "With respect to such a visitor at least, we consider it settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know; and that, when there is evidence of neglect, the question whether such reasonable care has been taken by notice, lighting, guarding, or otherwise, and whether there was such contributory negligence in the sufferer, must be determined by a jury as a matter of fact."

It was so determined in this case, and though I am far from saying that there was not evidence that the plaintiff largely contributed to the accident by his own negligence, yet that was for the jury; and I think there was clearly some evidence for them that the defendant had not used reasonable precautions, and that the judge therefore would have been wrong if he had nonsuited the plaintiff.

CHANNELL, B., BLACKBURN, J., MELLOR, J., and PIGOTT, B., concurred.

Judgment affirmed.

Attorneys for plaintiff: *Sturmy & Diggles.*
Attorney for defendant: *G. Henderson.*

1867
Jan. 31.

MOORE *v.* WATSON.

Costs—Compulsory Reference—County Court Act (13 & 14 *Vict. c.* 61), *s.* 11; *Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *s.* 3.

An action of contract was compulsorily referred to a master under s. 3 of the Common Law Procedure Act, 1854, and it was ordered that the costs of the cause should abide the event, and that the costs of the reference should be in the discretion of the master. The master awarded to the plaintiff a sum less than 20*l.*, and directed the defendant to pay the costs of the reference:—

Held, that the plaintiff was not entitled to these costs; for that they could only be recovered upon the judgment entered on the award, and (the judgment being for a sum not exceeding 20*l.*) s. 11 of the County Court Act (13 & 14 Vict. c. 61) deprived the plaintiff of costs.

THIS was a motion for a rule for the return of 23*l.* 6*s.* 10*d.* paid by the defendant to the plaintiff's attorney under protest, and claimed to be due to the plaintiff under a certificate for costs of reference given him by a master of the court, upon the ground that the plaintiff was not entitled to such costs by reason of the operation of 13 & 14 Vict. c. 61, s. 11.

The action was on contract, and was compulsorily referred to a master, under the Common Law Procedure Act, 1854, s. 3, and by the terms of the order of reference the costs of the action were to abide the event, and the costs of the reference to be in the discretion of the master. The master awarded to the plaintiff 17*l.* 3*s.* 5*d.*, and directed that the defendant should pay the costs of the reference. The action was one in which the superior courts had not concurrent jurisdiction with the county courts, and an application had been made to a judge at chambers to certify that the cause was fit to be tried in the superior court, and he had refused to do so. The master taxed the costs of the reference at 23*l.* 6*s.* 10*d.*, and gave his allocatur for the amount, which the defendant paid under protest.

Griffits, for the defendant. The master's allocatur for the costs of the reference is wrong. By the County Court Act (13 & 14 Vict. c. 61), s. 11, it is provided that, if in an action such as the present the plaintiff recover a sum not exceeding 20*l.*, he shall have judgment to recover that sum only, and *no costs;* whereas if

the master's allocatur is valid, the plaintiff here will recover costs, under the name of costs of the reference, though he has recovered in the action a sum not exceeding 20*l*. In *Robertson* v. *Sterne* (1) it was decided that the certificate of the master under a compulsory reference, such as the present one, was to be treated as a verdict, and that the reference was subject to the statutory conditions of the County Court Act. In *Cowell* v. *Amman Colliery Company* (2) the Court, after consultation with all the judges, held that the County Court Act applied to the case of a reference by consent.

Thesiger shewed cause in the first instance. There have been many cases before the courts in which the master has found for the plaintiff, and awarded to the plaintiff the costs of the reference, but in which the only application has been to deprive the plaintiff of the costs of the cause; it has never been doubted that he was entitled to the costs of the reference. Such was the case in *Cowell* v. *Amman Colliery Company* (2), which therefore is no authority against the plaintiff; and also in *Frean* v. *Sargent.* (3) The Common Law Procedure Act, 1854, s. 3, which gives the power of compulsory reference, provides that the cause shall be referred upon such terms as to costs as the judge shall think reasonable. This is a later act than the County Court Act, and therefore overrides it. In the present case the terms that the judge has imposed are that the costs of the reference shall be in the discretion of the master, and the master therefore has complete control over them. In *Robertson* v. *Sterne* (1) a distinction seems to have been drawn between the costs of the cause and the costs of the reference, and the judgment turns on the words, "shall abide the event." There is power to refer a cause to a county court judge, and, if that were done, can it be contended that the plaintiff could not recover the costs of the trial?

[WILLES, J. According to my view, the costs of a compulsory reference are costs of the cause; they are taxed upon the judgment, and can only be recovered on it.]

If such were the case, there would be no meaning in the distinc-

(1) 13 C. B. (N.S.) 248; 31 L. J. (C.P.) 362, 9 Jur. N.S. 332.

(2) 6 B. & S. 333; 34 L. J. (Q.B.) 161, 11 Jur. N.S. 687.

(3) 32 L. J. (Ex.) 281.

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tion made in the order of reference between the costs of the cause and the costs of the reference; and the Court will give effect to the terms of the order.

Griffits, in reply.

BOVILL, C.J. The words of the County Court Act (13 & 14 Vict. c. 61), s. 11, are imperative, that if the plaintiff in an action of contract, except in certain specified cases, shall recover less than 20*l.*, he shall have judgment to recover such sum only, and no costs. It is clear that the intention of the legislature was that all actions for small amounts should be brought in the county courts, so as to avoid unnecessary expense. In this case an order of reference was made, under the compulsory powers of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 3, which provides that the award of the arbitrator shall be enforceable in the same way as the finding of a jury. The costs of the award are always taxed on the judgment, and treated therefore as part of the costs of the cause. Looking, then, at *Robertson* v. *Sterne* (1) and *Cowell* v. *Amman Colliery Company* (2), it seems to me that these are costs the recovery of which is forbidden under the County Court Act. When the matter is referred the judge cannot tell whether that act will apply or not; and it is safer, therefore, to leave the costs to be regulated by the County Court Act. No injustice can be done by our so deciding, because by 15 & 16 Vict. c. 54, s. 4, the plaintiff is enabled to apply to a judge, in any action in which he is not entitled to recover his costs by reason of the provisions of 13 & 14 Vict. c. 61, s. 11, for an order for costs, and that is the course that should be adopted if the sum recovered is under 20*l.*

6 Ex 203

WILLES, J. I am of the same opinion. The order of reference, and the certificate of the master, when viewed in the light of the statute, are correct, but the taxation is, I think, wrong. At the time when the order was made, it was possible that the plaintiff might recover more than 20*l.*, and the order, therefore, could rightly give the master discretionary power over the costs. The

(1) 13 C. B. (N.S.) 248; 31 L. J. (C.P.) 362, 9 Jur N.S 382

(2) 6 B. & S. 333; 34 L. J. (Q.B.) 161, 11 Jur N.S 608

order must be read subject to an implied condition that the costs shall be such as are recoverable by law. The reference being compulsory, and to the master, whose award by the very terms of the act (17 & 18 Vict. c. 125), s. 3 is to have the effect of the verdict of a jury, the costs incurred before the master are costs in the cause; and the plaintiff would necessarily be entitled to the whole, if he recovered more than 20*l.*, but for the clause in the order which leaves the costs of the reference in the hands of the master, and which thus enables him by his award to deprive the plaintiff of that part of the costs of the cause if he pleases. When for shortness the order directs that the costs in the cause shall abide the event, it really means that part of the costs which are not incurred on the reference. It may be that if the plaintiff recovered less than 20*l.*, the master might still give the defendant costs, and that they might be taxed on the order of reference; it may be so; at all events, there is no statute against it, whereas the County Court Act expressly deprives the plaintiff of his costs unless he obtains the certificate of a judge. On this point, however, it is unnecessary to express an opinion. It would, I think, be flying directly in the face of the legislature if we said that part of the costs of the cause, which are here called costs of the reference, could be recovered by the plaintiff, when the County Court Act expressly says that they shall not.

MONTAGUE SMITH, J. I am of the same opinion. I think it is of great importance that we should not infringe upon one of the chief provisions of the County Court Act, viz. that if the plaintiff recovers less than 20*l.* he shall not be able to recover any costs without the certificate of a judge. The question is, whether the discretionary power given by the Common Law Procedure Act, 1854, s. 3, to a judge to order a reference on such terms with respect to costs as he sees fit, enables him to make an order which would have the ultimate effect of infringing these provisions. I think it was not intended to give him such power. No words can be stronger than those of the County Court Act, that if the plaintiff shall recover a sum not exceeding 20*l.*, "he shall have judgment to recover such sum only, and no costs," except in certain specified cases. Here the plaintiff has recovered less than 20*l.*, and

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would recover the costs of the reference under the judgment if he is to have them at all, when by express words he is not to have judgment for costs.

No doubt power is given by the Common Law Procedure Act, 1856, to a judge to insert any terms in the order with respect to costs; but that power is to be exercised with reference to the provisions of the law. My Brother Willes has pointed out how the provision, that the costs of the reference shall be at the discretion of the arbitrator, may become material. Part of the costs might under it be awarded to the defendant, and as the provision in 17 & 18 Vict. c. 125, s. 3, that the award shall be enforceable by the same process as the finding of a jury, is only a direction as to the mode of procedure, it may be that the payment of costs so awarded, not being costs on any judgment, might be enforced. Here, however, the whole costs are costs on the judgment, and by reason of the County Court Act, cannot be recovered.

Rule absolute.

Attorney for plaintiff: *A. S. Edmunds.*

Attorneys for defendant: *Torr, Janeway, & Tagart.*

Jan. 26.

WOODGER *v.* THE GREAT WESTERN RAILWAY COMPANY.

Carrier—Delay in delivering Goods—Remoteness of Damage—Hotel Expenses.

A commercial traveller delivered a parcel of samples to a common carrier to be carried to A., but did not state the contents of the parcel, or the purpose for which it was required. By the negligence of the carrier the parcel was delayed, and the traveller spent three days at A. unemployed, waiting for it. In an action against the carrier for negligence, in which the hotel expenses of the traveller during the time he was waiting for the parcel were claimed as damages:—

Held, that such damages were too remote, and could not be recovered.

DECLARATION. First count, that the plaintiff delivered to the defendants, as carriers of goods for hire, certain goods to be carried from Oxford to Liverpool, and there delivered to the plaintiff, for reward to the defendants; that the defendants promised to carry the goods from Oxford to Liverpool, and there deliver the goods within a reasonable time in that behalf; that the plaintiff delivered the goods to the defendants, and the

defendants received the goods, on the terms aforesaid; that all conditions were fulfilled, &c.; yet the defendants did not carry and deliver the goods within a reasonable time, whereby part of the goods were lost, and the plaintiff was deprived of the use of the residue of the goods for a long time, and they were diminished in value, and the plaintiff lost certain commission and profits which he would have acquired from the sale of the goods, and also lost certain customers, with whom he had made appointments for exhibiting the goods for sale, and incurred certain useless expenses in making journeys to sell the goods, and was otherwise injured and damnified.

Second count, that, in consideration that the plaintiff would employ the defendants to carry the goods, the defendants promised to use due care, skill, and diligence in carrying them; breach, that they did not use due care, skill, and diligence, and alleging special damage, as in the first count.

Pleas. 1st, non assumpsit; 2nd, to the first count, that the defendants did not receive the goods on the terms alleged; 3rd, to the first count, traverse of the breach; 4th, to the first count, a plea setting up the Carriers Act, 11 Geo. 4 and 1 Wm. 4, c. 68, s. 1; 5th, to the second count, that the plaintiff did not employ the defendants on the terms alleged; 6th, to the second count, traverse of the breach; 7th, to the second count, a plea similar to the fourth.

Issue thereon, and demurrer to the fourth plea.

At the trial before Lush, J., at the summer assizes at Liverpool, it appeared that the plaintiff was a commercial traveller, and had delivered a parcel containing samples of jewelry, to the defendants at Oxford, to be carried by them to Liverpool, without, however, stating its contents, or the purpose for which he sent it. The parcel did not arrive till four days later than it should have done, and then some of the goods were missing; the plaintiff was unable, in consequence, to transact his business at Liverpool, but remained there, waiting for the parcel, and making frequent inquiries for it. It was admitted that no damages could be recovered for the loss of the goods which were missing, on account of the provisions of the Carriers Act, and that the remainder had not become of less value by the delay; but the plaintiff claimed the expenses he

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had incurred at the hotel during the time that he was waiting for the parcel. The judge directed the jury that the plaintiff was not entitled to recover those expenses, but was entitled to a verdict for nominal damages, if the goods had been delayed through the negligence of the defendants. The jury found a verdict for the plaintiff: damages, one shilling. The judge then left it to the jury to say what the reasonable hotel expenses of the plaintiff in fact were, and they having found that they were 5*l.*, gave the plaintiff leave to move to increase the damages by that amount.

Littler having obtained a rule pursuant to the leave reserved,

Brett, Q.C., and *C. Crompton*, shewed cause. It must be taken, after the finding of the jury, that the delay was caused by the negligence of the defendants, but the delay caused no injury for which the plaintiff can recover. The defendants were not told the contents of the parcel; and that the plaintiff should incur hotel expenses was not a result of the delay contemplated by the parties.

Littler in support of the rule. The hotel expenses were a natural result of the delay of the parcel. In *Adams* v. *Midland Railway Company* (1) it was admitted that the plaintiff was entitled to recover the expenses he incurred in going from Limerick to Liverpool, in search of his goods, which had been delayed. In *Hamlin* v. *Great Northern Railway Company* (2) the judge ruled that the plaintiff was perhaps entitled to the expense of a bed during the night he was delayed. In *Cranston* v. *Marshall* (3) the expenses incurred by the plaintiff while waiting for a steamship which had been guaranteed to sail at a particular time, were allowed; and in *Bodley* v. *Reynolds* (4) it was held that damages beyond the value of the goods could be recovered in an action of trover, if specially laid in the declaration. It was, at any rate, a question for the jury whether these expenses were reasonable damages: *Black* v. *Baxendale*. (5)

BOVILL, C.J. In this case a parcel was booked at Oxford to be

(1) 31 L. J. (Ex.) 35.
(2) 1 H. & N. 408; 26 L. J. (Ex.) 20.
(3) 5 Ex. 395; 19 L. J. (Ex.) 340.
(4) 8 Q. B. 779; 15 L. J. (Q.B.) 219.
(5) 1 Ex. 410; 17 L. J. (Ex.) 50.

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conveyed to Liverpool. No intimation was given of the object with which it was sent, or the purposes for which it was required. It is difficult to see how, under these circumstances, any such damages as the plaintiff's hotel expenses could have been reasonably within the contemplation of the parties; and I think, therefore, that the learned judge was perfectly correct in his ruling. It is true that in *Black* v. *Baxendale* (1) it was left to the jury whether the plaintiff was entitled to damages of a similar description, and the Court held that it might be so left, but that the jury were wrong in the amount that they found. That case, however was decided seven years before the rule was laid down in *Hadley* v. *Baxendale* (2), which has since been always acted on, that only such damages can be recovered for the breach of a contract as were reasonably within the contemplation of the parties at the time the contract was made. The last case on the subject is, *Great Western Railway Company* v. *Redmayne* (3), in which it was held that the loss of profit by reason of the plaintiff, a commercial traveller, having left the town before the goods arrived, could not be recovered; and such profit would seem to be more naturally within the contemplation of the parties than hotel expenses; and that case, therefore, seems to me a strong authority against the plaintiff.

MONTAGUE SMITH, J. I am also of opinion that this rule should be discharged. The claim of 5*l.* was put forward as a specific claim for hotel expenses, and as such is not, I think, recoverable. The parcel was simply delivered to the defendants at Oxford, to be carried to Liverpool, without any notice being given to them of the character of its contents. Under such circumstances, the only damages that would be recoverable would be such general damages as a jury might see fit to give. They might, no doubt, include cab-hire, or other reasonable expenses, if the plaintiff had to call several times at the company's office in endeavouring to recover the goods. In *Great Western Railway Company* v. *Redmayne* (3), the Court held that the market value of goods was their value independent of any circumstances peculiar to the plaintiff; and

(1) 1 Ex. 410; 17 L. J. (Ex.) 50. (2) 9 Ex. 341; 23 L. J. (Ex.) 179.
(3) Law Rep. 1 C. P. 329.

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I think the plaintiff is only entitled to recover such damages as are independent of any matters personal to himself, which this claim of 5*l.* is not.

Rule discharged.

Attorney for plaintiff: *R. W. Roberts.*
Attorneys for defendants: *Maples & Co.*

Jan. 19.

HALL *v.* THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF BRISTOL.

Public Health Act, 1848 (11 & 12 *Vict. c.* 63), *s.* 144—*Damage.*

A board of public health are not bound to give compensation, under the Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 144, for any damage which they may cause, which would not have been actionable if they had not been acting under the authority of the act.

ACTION on an award made ex parte under the authority of the Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 123, awarding 200*l.* as compensation to the plaintiff, for injury done to certain houses belonging to him, by works executed by the defendants. Pleas: 1. Traverse of the award. 2. That the premises mentioned in the declaration were not injured by the execution of the defendants' works, nor the plaintiff entitled to compensation. 3. That the defendants not only did not agree as to the amount of the compensation to be paid to the plaintiff, but denied his right to any compensation.

The case was tried before Blackburn, J., at the summer assizes at Bristol, when it appeared that the mayor and corporation of Bristol, acting as a local board of health, had made a sewer in John Street, St. Philip's, Bristol. The plaintiff was the owner of seven houses in that street, which had been built within twenty years on old foundations, in the place of buildings of a much lighter construction. After the making of the sewer, the houses were found to be cracked and injured. The defendants having refused to give the plaintiff any compensation, the latter appointed an arbitrator under the provisions of the 123rd section of the Public Health Act, 1848 (11 & 12 Vict. c. 63), and the de-

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fendants not appearing, the arbitrator made an award in favour of the plaintiff, and fixed the compensation at 200*l.* The judge left it to the jury to say whether the making of the sewer caused the plaintiff's land to give way, independently of any extra weight put upon it within the preceding twenty years; and told them that, if they thought the damage would not have been caused unless the extra weight had been put upon it, they ought to find for the defendants. The jury found for the defendants.

Coleridge, Q.C., having obtained a rule for a new trial on the ground of misdirection,

The Solicitor-General, Pollock, Q.C., and *Cole, Q.C.*, shewed cause. The question is, whether a plaintiff is entitled to compensation under 11 & 12 Vict. c. 63, s. 144 (1), for damage that has been occasioned to him, whether the act causing such damage infringed any right, and was therefore actionable, or not. It has been decided that, under s. 68 of the Lands Clauses Consolidation Act (8 Vict. c. 18), compensation can only be claimed when an actionable wrong has been suffered: *Caledonian Railway Company* v. *Ogilvy* (2); and the legislature is not likely to have imposed greater burdens on a body acting solely for the public good, like a local board of health, than on a company making works for its private advantage. The case of *New River Company* v. *Johnson* (3), is a case in which the same was decided with respect to the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), which contains a provision exactly similar to that in the Public Health Act. In many cases, the owner of the property is bound to make sewers and do other acts; and the board are impowered to do the work in case of his default. It is clear the owner would not be bound to give compensation to his tenant in a case such as the present, and the board who take his place can hardly, therefore, be liable to him.

Coleridge, Q.C., and *Prideaux, Q.C.*, in support of the rule. The whole question turns on a comparison between the Public Health

(1) s. 144: "That full compensation shall be made . . . . to all persons sustaining any damage by reason of the exercise of any of the powers of this Act."

(2) 2 Macq. 229.

(3) 29 L. J. (M.C.) 93, 6 Jur. N.S. 374. 2 B. & S. 485.

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Act, 1848 (11 & 12 Vict. c. 63), and the Lands Clauses Consolidation Act (8 Vict. c. 18). In the 68th section of the latter act, it is enacted, that if any person is entitled to compensation, certain machinery shall be adopted to settle the amount of it: the act gives no new right to compensation, but only provides an easy mode of enforcing existing rights. The Public Health Act, on the contrary, gives an express right to compensation for all damage. A second distinction, relating to the phraseology of the acts, which supports this view, is that the Lands Clauses Consolidation Act uses the words "*injuriously* affected," while the Public Health Act uses the expression "any *damage*." The difference between injuriâ and damnum is well known to all lawyers, and is exactly the distinction contended for in the present case. In the notes to *Ashby* v. *White* (1), where the distinction is carefully examined, the depriving land of lateral support is given as an instance of *damage* without injury. The plaintiff, therefore, is entitled to compensation for the damage done to his houses, though they have not been built for twenty years and he has not, therefore, sustained an actionable injury.

KEATING, J. This is a case in which an action was brought on an award, giving the plaintiff compensation under the 144th section of the Public Health Act, 1848 (11 & 12 Vict. c. 63), and the present rule was granted on the ground that the judge had misdirected the jury by telling them, in effect, that damage in that section means actionable damage. I am of opinion that the judge was right in his direction. No doubt there is a distinction between the wording of this act and that of s. 68 of the Lands Clauses Consolidation Act, since it uses the word "damage" while the latter uses the words "injuriously affected," and it is contended that we must construe these words with reference to the known distinction between damnum and injuriâ. The question resolves itself into this, did the legislature use the word "damage" with reference to the above distinction? and I think, looking at the object of the Public Health Act, and the terms used in it, the legislature could not have intended to give compensation

(1) 1 Sm. L. C. 6th ed. 261.

in cases in which there would, apart from the act, have been no legal right to it. It seems to me, it would require words admitting of no other construction to lead to such a conclusion, and here it is quite a legitimate construction to confine the words to actionable damage.

MONTAGUE SMITH, J. I am of the same opinion. It may be assumed that, apart from the act, the plaintiff would not have been entitled to compensation for damage such as that which has been occasioned by the defendants, and the question therefore is, whether the 144th section of the Public Health Act gives a right to such compensation? The language is undoubtedly somewhat different from that used in s. 68 of the Lands Clauses Consolidation Act; but it seems to me that we must not look at the technical meaning of the words "damnum" and "injuriâ," but to the nature of the body in which the powers are vested, and to the construction given to similar acts. It has been decided by the House of Lords, in *Caledonian Railway Company* v. *Ogilvy* (1), to be the true principle of construction of the Lands Clauses Consolidation Act, to confine the meaning of the words to such injuries as would have given a right to compensation independently of that statute; and I think it would be difficult to give a larger construction to the words of this act, which is passed for public purposes. A wider construction, too, would lead to great difficulty, because there are a variety of things which are not actionable, but which do yet cause damage to a man's property; such as the erection of something causing a loss of prospect, or the erection of a public convenience, though at such a distance as would prevent its being an actionable nuisance. It would be very difficult to provide for or set a limit to such claims, if they were recognised. Persons living in a town must put up with some inconveniences, and their protection against the wanton infliction of them is to be found in the fact that a board of health is a public body, and elected by the inhabitants, who, therefore, can control it. I think, moreover, that we cannot, in applying a rule of construction, treat this as a matter of first impression, because the analogy between this and the Lands Clauses Consolidation Act is so close

(1) 2 Macq. 229.

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that we are, I think, bound by the construction that has been put upon that act.

Rule discharged.

Attorneys for plaintiff: *Clarke, Woodcock, & Ryland, for Fussell & Pritchard, Bristol.*

Attorneys for defendants: *Warry & Co., for J. Heaven, Bristol.*

Jan. 22.

TIDSWELL *v.* WHITWORTH.

Landlord and Tenant—Lease, Construction of—Covenant to pay Taxes, &c.—Imposition on Landlord under a Local Improvement Act.

By the Manchester Improvement Act, 1851, 14 & 15 Vict. c. cxix., the council were impowered to order streets to be sewered and paved by the *owners* of the adjoining premises, and, in case of default by such *owners*, to do the work themselves, and to charge the respective *owners* with their proportionate parts of the expenses thereof, to be recoverable by action of debt, &c. And, by way of additional remedy, the council were impowered to require payment from any present or future *tenant or occupier*, to be levied by distress, and it was made compulsory on the owner to allow such payments to be deducted from the rent.

In 1863, premises in G. Street were demised by the plaintiff to the defendant for seven years, at the "clear yearly rent" of 90*l.*, the latter covenanting that he would "pay and discharge all taxes, rates, assessments, and impositions whatsoever (except property-tax) which during the term should become payable in respect of the demised premises."

In 1865, the council gave notice to have G. Street sewered and paved. The plaintiff neglecting to do the required work, the council caused it to be done, and assessed his proportion of the expense at 213*l.* 3*s.* 6*d.*, which he paid:—

Held, that, the payment having been made by the plaintiff, not for a rate, assessment, or imposition which had become payable in respect of the demised premises, but for the breach of a duty imposed upon *him* by the act of parliament, he was not entitled to call upon the defendant under his covenant to repay him the amount.

Sweet v. *Seager* (2 C. B. (N.S.) 119), distinguished.

By an indenture of the 13th of July, 1863, the plaintiff, in consideration of the yearly rent and covenants therein reserved and contained on the part of the defendant, his executors, &c., demised to the defendant, his executors, administrators, and limited assigns, certain premises at Manchester for seven years from the 29th of September then next, at the clear yearly rent of 90*l.*, payable quarterly: and the defendant, for himself, his heirs,

&c., covenanted to pay the rent, and also that he would "pay and discharge all taxes, rates, assessments, and impositions whatsoever (except property or income-tax in respect of the said rent) which from and after the 24th of June last, and during the said term, should become payable in respect of the demised premises."

The Manchester General Improvement Act, 1851 (14 & 15 Vict. c. cxix), contains the following enactments:—

Section 15. "If any street or part of a street (not being a highway repairable by the inhabitants at large) which now is or shall at any time hereafter be formed or set out within the borough, shall not be sufficiently sewered and drained, levelled, flagged, and paved, to the satisfaction of the council, it shall be lawful for the council to order that any such street or part thereof shall be freed from obstruction, and sewered and drained, levelled, flagged, and paved, or otherwise completed, in such manner and within such time as the council shall order and direct; and thereupon the respective owners of the houses and ground lying alongside or adjoining to the said street shall within such time and in such manner as shall be expressed in such order, at their respective charges and expenses, remove all obstructions, and well and sufficiently sewer and drain, level, flag, and pave, or otherwise complete such streets respectively."

Section 17. "If any such owners shall neglect or omit to remove the obstructions, and sewer, drain, level, flag, and pave, or otherwise complete such street, or any part of such street, within such time and in such manner as expressed in the said order, it shall then be lawful for the council to remove all obstructions, and to sewer, drain, level, flag, and pave, or otherwise to complete, as they shall think fit, the said street, or such part thereof as shall not have been done pursuant to the said order, and to charge such respective owners with their several proportionate parts of the charges and expenses thereof, or which are incidental thereto, according to the extent of their respective houses and grounds lying alongside or adjoining to the said street, such share and proportion to be ascertained and settled by or under the direction of the said council; and all the charges and expenses which the council shall thereby sustain, incur, or pay, and shall so charge upon such owners respectively, shall, on demand, be forthwith

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refunded to the council by such owners respectively," and shall be recoverable by action of debt, &c.

Section 18. "By way of additional remedy, it shall be lawful for the council, whether any such demand shall have been made upon such owner or not, to require the payment of all or any part of such charges and expenses from the person who shall then or at any time thereafter occupy any such houses or ground; and, in default of payment thereof by such occupier, on demand by the council, the same may be levied by distress, &c.; and the owner shall allow every such occupier to deduct all sums of money which he shall so pay, or which shall be levied by distress, out of the rent from time to time becoming due in respect of the said houses or ground, as if the same had been actually paid to such owner as part of such rent."

Section 19. "In no case, except as hereinafter mentioned, shall any occupier be liable to pay more money in respect of such charges and expenses as aforesaid than the amount of rent due from him at the time of the demand made upon him for such charges and expenses, in case he shall pay the same or any part thereof on demand, or at the time of the issuing the warrant of distress or the levying thereof, in case such charges and expenses or any part thereof shall be levied by distress: Provided, nevertheless, that, if any occupier shall pay any rent to his landlord after notice from the council requiring him not to do so, such occupier shall be liable to pay in respect of such charges and expenses the amount of the rent so paid by him after such notice, or the same may be recovered from him by warrant of distress as aforesaid; and, after any such notice shall have been delivered as aforesaid, it shall not be lawful for the landlord of the premises to which such notice applies to commence or prosecute any action at law for the recovery of rent for such premises until the charges and expenses on account of which such notice shall have been given shall be paid."

Section 20. "In case it shall happen that two or more tenements in the occupation of separate persons, lying alongside or adjoining to any such street as aforesaid, shall belong to the same owner, each of the persons occupying the same shall be liable to pay the whole or any part of the said charges and expenses to

which such owner shall be liable in respect of all or any of such tenements, without reference to the particular tenement or the extent of the frontage thereof occupied by any such person, and the same may be levied by distress accordingly."

By the interpretation clause, s. 144, the word "owner" was to mean the person for the time being receiving the rack-rent of the lands or premises in connection with which the word was used, or who would receive the same if such lands or premises were let at a rack-rent.

The premises demised to the plaintiff by the indenture of July, 1863, consisted of a house and garden abutting on Oxford Road and Grafton Street, Manchester. At the date of the lease Grafton Street had been laid out and dedicated to the public, but was not flagged or sewered. In 1865, the corporation of Manchester gave notice, under the Manchester Improvement Act, of their intention to have Grafton Street levelled, sewered, and paved. The plaintiff, as "owner" of the property, neglecting to do the required work, the council proceeded to do it, and assessed the proportion of the expenses payable by him at 213*l.* 3*s.* 6*d.* The plaintiff paid the amount, and sought by this action to recover it from the defendant upon his covenant.

At the trial before Martin, B., at the last assizes at Manchester, the defendant contended that the charge in question was not a "tax, rate, assessment, or imposition," which became "payable in respect of the demised premises," within the terms of the covenant, but a charge upon the owner in respect of his ownership.

The learned judge reserved the point; and a verdict was found for the plaintiff for the sum claimed.

Holker (Nov. 5, 1866) obtained a rule nisi to enter a verdict for the defendant or a nonsuit, on the ground that there was no breach of the covenant declared on.

Quain, Q.C., and *R. G. Williams* (Jan. 22, 1867), shewed cause. The question is, whether the sum assessed upon the plaintiff in respect of the levelling, sewering, and paving of Grafton Street under the Manchester Improvement Act, 1851, is a "rate, assessment, or imposition" within the meaning of the defendant's covenant. It is submitted that it is. It is a charge upon the landlord

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in respect of the premises. The case is not to be distinguished from that of *Sweet* v. *Seager*. (1) That case arose under the Metropolis Local Management Act, 18 & 19 Vict. c. 120, which, with the exception of one section (2), contains provisions exactly like those of the statute under consideration.

[BOVILL, C.J. The words of the covenant in that case were larger than these. They were, "pay, bear, and discharge all such parliamentary, parochial, and county, district and occasional levies, rates, assessments, taxes, charges, impositions, contributions, burthens, duties, and services whatsoever, as during the said term should be taxed, assessed, or imposed upon or in respect of the said premises thereby demised, or any part thereof." Suppose the plaintiff (the lessor) had done the work himself under s. 15, could he have recovered the amount expended from the tenant?]

If done in pursuance of an order of the council under that section, it would be a charge upon the landlord in respect of the premises, and within this covenant. The words of the covenant in *Sweet* v. *Seager* (1), though more numerous, are substantially the same as those used here. The lessor is to have the *clear* yearly rent of 90*l.* In Bac. Abr. Covenant (F), it is said that, "if a lease be made for years, rendering 80*l.* per annum rent, free and clear from all manner of taxes, charges, and impositions whatsoever, the lessee is bound to pay the whole rent without any manner of deduction *for any old or new tax, charge, or imposition whatsoever;*" for which is cited *Giles* v. *Hooper* (3); *Sherington* v. *Andrews*. (4) "So, where A. by deed dated 1649 granted a rent-charge of 40*l.* per annum to B. and his heirs, and on the same deed there was an indorsement that the rent was to be paid clear of all taxes; and by 3 Wm. & M. (5), 4*s.* per pound was laid upon land, and power given to the tenant to deduct 4*s.* in the pound, with a proviso not to alter the covenants or agreements of parties,—it was holden that such a covenant, if

(1) 2 C. B. (N.S.) 119.

(2) Section 219, which enacts "that nothing herein contained shall be taken to affect any contract made or to be made between any owner and occupier of any house, building, or other property whereof it is or may be agreed that the occupier shall pay and discharge all *rates, dues, and sums of money payable in respect of such house*, building, or other property, or to affect any contract whatever between landlord and tenant."

(3) Carth. 135.

(4) Comb. 483.

(5) 4 W. & M. c. 1.

made in the year 1640, would not have freed the rent-charge from the taxes imposed by those acts, because there was no such parliamentary tax in being or known at that time; but because there were such taxes in the year 1645, which was before the grant, therefore this covenant must be construed to extend to them:" *Brewster* v. *Kitchin.* (1) In *Payne* v. *Burridge* (2), by a local act, the commissioners appointed thereby were authorized to pave and flag footways, and the costs thereof were to be paid by the tenants or occupiers of the houses next adjoining; in default whereof they were to be recovered by distress: another clause impowered the tenant to deduct the costs so paid by him out of his rent: and it was held that this charge was within the terms of a covenant in a lease subsequently made, whereby the tenant covenanted to pay all taxes, rates, duties, levies, assessments, and payments whatsoever which were or during the term might be rated, levied, assessed, or imposed on the premises.

[BOVILL, C.J. That was in the nature of a rate or assessment imposed upon the tenant or occupier.]

The substance is the same, though the machinery is no doubt different. In *Waller* v. *Andrews* (3), by a memorandum of agreement certain marsh lands were demised by the plaintiff to the defendant, subject to a condition that the defendant should pay all outgoings whatsoever, rates, taxes, *scots*, &c., whether parochial or parliamentary, which then were or should be thereafter charged or chargeable upon or on account of the said marsh lands (the then present land-tax only excepted); and it was held that an extraordinary assessment made by commissioners of sewers upon the lands for a work of permanent benefit to the land, was within the meaning of the agreement. It is impossible to distinguish that case in principle from this. In *Commins* v. *Massam* (4), a lessee for years of lands within a level subject to be drowned by the sea, covenanted to pay all assessments, charges, and taxes towards or concerning the reparation of the premises. A wall which was in defence of this level was thrown down by a tempest; and the commissioners of sewers caused a new wall to be erected, and taxed every man within the level towards the expense, and among others

(1) 1 Ld. Raym. 317; 1 Salk. 198; Carth. 438; 5 Mod. 368; Comb. 424, 467.
(2) 12 M. & W. 727. (3) 3 M. & W. 312. (4) March, 196.

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the lessee for years, whom they "charged totally for his land, not levying anything upon him in the reversion." Upon a certiorari to remove the proceedings of the commissioners, the Court of King's Bench held that the charge was properly laid upon the lessee; Heath, J., saying, "I conceive they (the commissioners) have well done here in laying all upon the lessee for years. By the law of sewers, all which may be endamaged or have benefit are chargeable, and it is in their discretion so to do. But in this case they may charge the lessee or lessor (if not for the special covenant of the lessee) at their discretions; for, the statute (1) saith *owners* or *occupiers;* and I conceive that the covenant here doth bind the lessee, for it is presumed that he hath considerable benefit for it; and the commissioners may take notice of it." There, as here, the term had nearly expired.

Holker and *Butt* in support of the rule. The covenant in question does not extend to such a charge as this. It is in effect an attempt by the landlord to impose upon the tenant the consequences of his own breach of duty; for the act of parliament makes the expenses of paving, sewering, &c., a charge upon the landlord analogous to the property-tax, there being provisions in this act which are equivalent to the express prohibitory clause in the Property Tax Act. (2) This is not a "tax, rate, assessment, or imposition," payable either by the landlord or by the tenant "in respect of the demised premises." By s. 15, the work is to be done by the owner of the premises, who by the interpretation clause, s. 144, is defined to be "the person for the time being receiving the rack-rent of the lands or premises in connection with which the word is used, or who would receive the same if such lands or premises were set out at rack-rent." If he neglects to do it, the council may (s. 17) do it, apportioning the expenses among the several owners. By way of additional remedy, the 18th section provides that the council may resort to the occupier, who may be distrained upon, and who is to deduct the sums he may be compelled to pay out of the rent from time to time accruing. By s. 19, the occupier is in no case to be called upon to pay more in respect of such expenses than the amount of rent due from him at the time of the demand made. By s. 24 a power of distress upon

(1) 23 Hen. 8, c. 5. (2) 5 & 6 Vict. c. 35, s. 73.

the "owner" is given. Section 30 provides that the occupiers shall, upon notice, pay their rent to the council towards the expenses due from the owners. And by s. 31 it is enacted that "all payments of rent by the occupier of any house or ground to the council under and by virtue of this act shall be deemed and taken to be good and valid payments and discharges of such rent, as if the same payments had been made to the owner of such house or ground, and every such owner is hereby required to allow such payments accordingly: and every owner who shall distrain upon his tenant for any rent which shall have been paid or which shall be payable to the council under and by virtue of this act, shall forfeit and pay the sum of 5*l.*, and such owner and all persons acting under him in making such distress shall be considered as trespassers," &c. That virtually amounts to a prohibition to the landlord to contract to cast this charge upon the tenant. The whole scope of the act shews that it is imposed upon the landlord as a personal liability in respect of his ownership of the soil, which extends to the middle of the street.

[BOVILL, C.J. It must not be assumed that a lease would not convey an interest in the land to the centre of the road, as an ordinary conveyance does, unless it is expressly excluded: *Simpson* v. *Dendy* (1); *Berridge* v. *Ward.* (2)

WILLES, J., referred to *Marquis of Salisbury* v. *Great Northern Railway Company* (3), and to *Lord* v. *Commissioners for the City of Sydney.* (4)]

The character of the charge is not altered by the provisions as to the mode of ascertaining the amount and enforcing payment. The cases referred to would seem at first sight to be opposed to this construction; but upon examination they will all be found to be distinguishable. The language of the covenant in *Sweet* v. *Seager* (5) was much larger than that of the covenant in this case. The work done there (under the Metropolis Local Management Act, 18 & 19 Vict. c. 120) was done for the immediate benefit of the premises, and was charged in the first instance upon the occupier. The

(1) 8 C. B. (N.S.) 433; (3) 5 C. B. (N.S.) 174; 28 L. J. (C.P.) 40,
(2) 10 C. B. (N.S.) 400; 30 L. J. (C.P.) 218, (4) 12 Moore P. C. 473.
(5) 2 C. B. (N.S.) 119.

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covenant in *Waller* v. *Andrews* (1) clearly embraced the charge there in question. And in *Payne* v. *Burridge* (2) no liability was imposed upon the owner; the occupier was made liable in the first instance. The landlord here is in effect seeking to impose upon the tenant something different from that which the act of parliament imposes upon himself. The owner may do the work; the tenant has no such option.

BOVILL, C.J. The question in this case arises upon the construction of a covenant in a lease, by which the defendant agreed to pay the clear yearly rent of 90*l.*, and also to "pay and discharge all taxes, rates, assessments, and impositions whatsoever (except property or income-tax in respect of the said rent) which should during the term become payable in respect of the demised premises." On the part of the plaintiff, the lessor, it has been contended that this includes a payment made by him in respect of a permanent improvement of the street by the corporation of Manchester, under the Manchester Improvement Act, 1851 (14 & 15 Vict. c. cxix.) The lease in question was granted after the passing of that act; but, upon the authorities, that seems to be an immaterial circumstance. It appears to me to be manifest from the general scope of the act that the legislature intended the burthen of this payment to be thrown upon the landlord. I cannot accede to the argument of Mr. Holker, that the 31st section of the act amounts to a prohibition of the tenant's taking upon himself this liability. The language of the prohibitory clause (s. 73 of the Property and Income Tax Act, 5 & 6 Vict. c. 35), is very different from that used here, for, there a contract for absolving the landlord from the tax is declared to be utterly void. There are no such words in this act. My opinion in favour of the defendant is formed upon a totally different ground. By s. 15 the duty of paving, sewering, &c., upon the requisition of the council, is imposed upon the landlord. If the landlord had performed that duty, it is extremely difficult to see what remedy he would have against the tenant for the recovery of the money he had expended in so doing. Where the work is done by the council, the statute contains provisions whereby recourse may be had to the tenant, by

(1) 3 M. & W. 312. (2) 12 M. & W. 727.

reason of the default of the landlord, to the extent of the rent from time to time becoming due from him. It has been insisted on the part of the plaintiff that, the non-performance by the landlord of the duty imposed upon him by the statute having entailed upon the tenant the liability to make a money payment to the council, such payment became a "tax, rate, assessment, or imposition," within the covenant. But it appears to me that none of those words refer to a payment like this, which is in the nature of a penalty for the non-performance by the landlord of a duty which by the express terms of the statute is cast upon him; the recourse to the occupier of the premises being given merely as a more convenient mode of enforcing payment by the landlord or owner. If there had been no decisions upon the subject, I should have entertained little or no doubt. Some of the cases which have been referred to certainly go somewhat near to the point now under consideration. But, when carefully looked at, it seems to me that they are all distinguishable. In *Waller* v. *Andrews* (1), the covenant of the tenant was to "pay all outgoings whatsoever, rates, taxes, *scots*, &c., whether parochial or parliamentary, which then were or should be thereafter charged or chargeable upon or on account of the said marsh lands." The assessment of the commissioners towards the expenses of a new sluice was clearly a "scot" within the very terms of the covenant. Again, in *Payne* v. *Burridge* (2), the terms of the covenant were much larger than those contained in this lease. The case principally relied on for the plaintiff was *Sweet* v. *Seager*. (3) But, looking at the language of the covenant in that case, it is almost impossible to conceive how larger words could have been employed. The reddendum there was, paying a certain yearly rent, "without any deduction whatsoever in respect of any taxes, rates, assessments, impositions, or any other matter or thing whatsoever then already or thereafter to be taxed, assessed, and imposed upon or in respect of the said premises, or any part thereof, by authority of parliament, or otherwise howsoever;" and the covenant was that the tenant should "pay, bear, and discharge all such parliamentary, parochial, and county, district, and occasional levies, rates, assessments, taxes,

(1) 3 M. & W. 312. (2) 12 M. & W. 727.
(3) 2 C. B. (N.S.) 119.

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charges, impositions, contributions, burthens, duties, and services whatsoever as during the said term should be taxed, assessed, or imposed upon, or in respect of, the said premises thereby demised, or any part thereof." All the judges, in dealing with the case, refer to the very large and comprehensive language of the covenant. The words, "burthens," "duties," and "services," are especially relied upon. Cockburn, C.J., says: "It clearly was the intention of the original landlord, and also of the lessor, that the tenant should bear the landlord harmless against all charges of a general local character imposed upon or in respect of the premises." And Cresswell, J., lays stress upon the evident intention of the parties that the lessor should receive a certain sum wholly independent of "any taxes or assessment of every description or upon any account." Regard being had to the language and the general object of the statute, and to the restricted terms of this covenant, I am clearly of opinion that the payment in question must fall upon the landlord, and that the tenant is not liable. The rule to enter the verdict for the defendant must therefore be made absolute.

WILLES, J. I am of the same opinion. If we were to decide this case without reference to the former authorities, I could not resist the arguments which have been urged on the part of the tenant, because the covenant here is to "pay and discharge all taxes, rates, assessments, and impositions" which shall become payable "in respect of the demised premises," meaning such rates and assessments as are imposed in the form of money charges upon the premises, and are ordinarily payable by the tenant, as in the case of a sewer-rate, which is always paid by the tenant, but may be afterwards deducted from his rent in the absence of a covenant to the contrary. The covenant in question would cover that. So, if an act of parliament imposes upon the tenant the performance of a duty, as in *Payne* v. *Burridge* (1), or a money payment if he omits to perform it: in that case, it is an assessment on the tenant, and is covered by the covenant to pay "all taxes, rates, duties, levies, assessments, and payments whatsoever which might be rated, levied, assessed, or imposed on the premises." So, in the

(1) 12 M. & W. 727.

case of *Waller* v. *Andrews* (1), the charge in question was a *scot* in the form of a money payment to be made by the tenant. The case of *Sweet* v. *Seager* (2) is open to this additional remark, that the tenant not only undertook to make money payments assessed upon or in respect of the premises, but also to bear burthens and perform duties and services, and so bound himself to indemnify the landlord against a payment imposed upon him in respect of a burthen which the tenant had taken upon himself. Under the Metropolis Local Management Act, 18 & 19 Vict. c. 120, the remedy is not given directly against the landlord, but only through the tenant: whereas, here, not only is the duty imposed upon the landlord, but it is a direct obligation upon him. The tenant is resorted to only by way of additional security, in case the landlord fails to perform the work or to pay the sum assessed for his default. By the machinery of this act, the tenant is not, properly speaking, assessed "in respect of the premises," but in respect of the landlord's having neglected to perform his duty. If the landlord had done the work himself, he could not have sued the tenant for the expense incurred. I felt some doubt at first whether we were not bound by the authorities. But, upon further consideration, I agree with my Lord that they are all distinguishable.

KEATING, J. I am of the same opinion. The simple question for us is, to ascertain the intention of the parties from the words of the covenant. The local act having imposed upon the owner of the premises the duty of paving and sewering the adjoining street, and he having made default, and having consequently been compelled to pay a certain sum to the council for his proportion of the expense of the work, he now seeks to recover the amount from his tenant, under a covenant by which the tenant was to pay "all taxes, rates, assessments, and impositions payable in respect of the premises." The word on which reliance has been placed to fix that extraordinary obligation on the tenant is, "impositions," which it is said is a word of such a large and extensive meaning as to include such a charge as this. Looking at the words with which it is associated in this covenant, it seems to me that that word is not to be taken in the widest sense of which it is susceptible,

(1) 3 M. & W. 312. (2) 2 C. B. (N.S.) 119.

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but that it must be limited to impositions in the nature of taxes, rates, or assessments. Were it not for the case of *Sweet* v. *Seager* (1), I should have entertained no doubt whatever. But, looking attentively at that case, I do not think it ought to govern us. The words of the covenant there were very much more comprehensive than those used here. The observation I have made upon the word "impositions" in this covenant, could not have been made upon the language of the covenant in that case. Under the terms of that covenant, the tenant bound himself not only to make money payments, but also to bear burthens and discharge duties. The case, therefore, is obviously and substantially distinguishable from the present, and will not be at all affected by our decision.

MONTAGUE SMITH, J. I must own I have felt considerable hesitation in coming to a conclusion in this case; not because I have felt any difficulty as to the proper construction of the act of parliament or of the language of the covenant, but because I doubted whether our decision might not trench on former cases. But, upon further consideration, I feel that the present case is distinguishable from all those which have been cited, and that it ought to be decided upon the terms used in the covenant itself. Those words all relate to money payments charged upon the tenant in respect of the premises; not to duties or burthens imposed upon the landlord, like that now in question. A burthen imposed upon the owner in respect of the premises could not fairly come within the language of this covenant. By the 15th section of the act, the owner is charged with the duty of sewering, paving, and flagging the street, not only in front of the houses, but also in front of any vacant ground lying alongside or adjoining the street. If he fails to perform that duty, the council may do the work and charge the owner for it. It is only by way of additional remedy that the tenant is (by s. 18) to be resorted to in the event of the landlord making default. And this liability is not confined to the person who may have been tenant at the time the work was done, but extends to any subsequent tenant. It is merely a mode of getting at the owner by means of an attachment of the rent. In

(1) 2 C. B. (N.S.) 119, 3 Jur. N.S. 588

all the cases referred to, not only was the language of the covenant different, but the language of the acts of parliament was also in some respects different. I feel bound to say that I think the decisions have gone quite far enough, and that I am not disposed to take a step further. The rule to enter a verdict for the defendant must be made absolute.

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Rule absolute.

Attorneys for plaintiff: *Walker & Twyford, for J. & E. Whitworth, Manchester.*

Attorneys for defendant: *Bower & Cotton, for Thomas V. Royle, Chester.*

LORD AND ANOTHER *v.* THE MIDLAND RAILWAY COMPANY.

Jan. 25.

Carrier—Railway Company—Contract to carry—Reasonableness of Condition—Loss of Market.

A contract by a railway company to carry goods by a given train, which ordinarily arrives in London at a particular hour, does not amount to a warranty that it will so arrive, although the company's servants be informed that the object of the sender requires that it should so arrive.

Meat was carried by the defendants for the plaintiffs under a consignment-note on the back of which was printed the conditions upon which it was carried, one of which was as follows:—"The company will not be responsible for any damage to any meat, on the ground of loss of market, provided the same be delivered within a reasonable time after the arrival thereof at the station from whence delivery is to be made:"—

Held, a reasonable condition.

THE first count of the declaration stated that the plaintiffs on several occasions delivered to the defendants, and the defendants accepted and received from the plaintiffs, quantities of meat upon and for a purpose and terms agreed upon between them, to wit, to be by the defendants carried and conveyed from Settle to London for reward to the defendants in that behalf, and there delivered by the defendants for the plaintiffs *by a certain hour in the morning;* that the defendants on the occasions aforesaid carried and conveyed the meat to London, and there delivered the same for the plaintiffs; and that, although all conditions were fulfilled, &c., yet the defendants did not deliver the said meat for the plaintiffs

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by the said agreed time, and the said parcels of meat were delivered after the said agreed time, *and thereby were too late for market*, &c.

The second count stated a delivery of meat to the defendants as carriers of goods for hire from Settle to London, to be delivered in London for the plaintiffs *with due and reasonable diligence and speed;* and a breach, by reason whereof the meat was delivered for the plaintiffs *too late for market*, &c.

The defendants pleaded, to the first and second counts, a traverse of the delivery of the meat to them upon the terms alleged,—to the second count, that the meat was carried and delivered with due and reasonable diligence and speed,—and, to the whole declaration, that the meat was delivered and accepted by them to be carried and delivered under and subject to a certain contract and condition which rendered them not liable for the loss or damage in the declaration, to wit, "that the defendants would not be responsible for any damage to any meat on the ground of loss of market, provided the same was delivered within a reasonable time after the arrival thereof at the station from whence delivery was to be made;" that the meat was delivered within a reasonable time after the arrival thereof at the station from whence delivery was to be made; and that the claim of the plaintiffs was a loss within the true intent and meaning of the said condition, and not otherwise. Issue thereon.

The cause was tried before Lush, J., at the last summer assizes at Liverpool. The plaintiffs are butchers carrying on business at Settle, in Yorkshire, where the defendants have a station. In June, 1864, the plaintiffs, wishing to send meat to Newgate Market for sale, made inquiries of one Smith, the defendants' station-master at Settle, to ascertain the rate which would be charged for its conveyance. Smith referred them to the traffic-manager at Derby, and accordingly on the 20th of June, 1864, the plaintiffs wrote as follows:—"We have engaged with Mr. Quick, of London, to send meat to him to sell. Can you arrange for it to leave Settle any time during the day, so that it will be in London not later than two o'clock in the morning?" Mr. Allport, the traffic-manager, wrote on the 21st requiring to be informed as to the probable amount of traffic, before he could answer the inquiry.

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On the 22nd the plaintiffs again wrote,—"We shall have 10 cwt. to 1 ton of meat three or four days a week, just as the market goes. The goods train leaving Ingledon for London at 8.30 a.m. would answer our purpose, if it could be arranged for it to stop at Settle and take our meat up." Mr. Allport, on behalf of the company, replied on the 29th,—"In reference to your letters of the 20th and 22nd instant, I have pleasure in informing you that I have arranged for the 8.30 a.m. goods train from Ingleton to King's Cross to stop at Settle for London meat, when required, on and after the 29th instant (this day), which I trust will fully meet your wishes." The rate agreed on was 65*s.* per ton. The plaintiffs sent considerable quantities of meat to London, each consignment being accompanied by a consignment-note containing the names and addresses of the consignees, the number of carcasses, and the weight. The consignment-note was generally written on a printed form supplied to the plaintiffs by the station-master at Settle. The meat having upon various occasions in 1865 failed to reach the market in time, the plaintiffs in consequence sustained serious loss. Complaints were thereupon made, and this action was brought. It was not suggested that the delay arose in London.

On the part of the defendants, reliance was placed upon a condition printed at the back of the consignment-notes,—"The company will not be responsible for any damage to any such articles [including meat] on the ground of loss of market, provided the same be delivered within a reasonable time after the arrival thereof at the station from whence delivery is to be made."

This was sought to be explained by the plaintiffs by shewing that the forms of consignment-notes which they had received from the station-master at Settle had no such condition at the back; that, the station-master there, having no more of those forms, had referred the plaintiffs to the station at Lancaster for a supply; and that, having received a supply from Lancaster, the plaintiffs had filled the notes up and signed them without looking at the condition.

It was further contended that the condition was unreasonable and void. And evidence was offered of conversations with Smith, the station-master at Settle, in June, 1864, for the purpose of supplementing the written evidence, and shewing that at the

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time when the notes were signed there was a valid contract between the plaintiffs and the company inconsistent therewith, viz. a contract that the meat should be in London in time for the market.

The learned judge rejected this evidence, and was of opinion that the letters did not prove the special contract declared on, and that the only question was, whether the meat was delivered to the defendants subject to the condition contained in the consignment-notes, and not whether the condition was reasonable or not, but that as to that he thought it was reasonable. He accordingly non-suited the plaintiffs, reserving them leave to move.

T. Jones, Q.C. (Nov. 3, 1866), obtained a rule nisi for a new trial, on the grounds,—first, that the judge ruled that there was no evidence to go to the jury, and that he excluded evidence of the defendants being liable on the special contract,—secondly, that the condition was void,—thirdly, that the defendants were liable, although the condition might be good.

Quain, Q.C., and *Holker* (Jan. 23, 25), shewed cause. If the question be open to the plaintiffs upon these pleadings, the condition indorsed upon the consignment-notes which constituted the contracts here, is clearly a reasonable one: *Beal* v. *South Devon Railway Company.* (1) The evidence of conversations with the station-master at Settle was properly rejected. The question substantially arises upon the letters. Do they shew a contract under which the meat was to be carried by the defendants? All the consignments were made subject to the condition indorsed on the consignment-notes: and it was not competent to the plaintiffs to give any evidence in contradiction of that. Besides, all that the letters amount to is, a mere suggestion by the plaintiffs that, if a particular train stopped at Settle, that would suit their purpose, and a desire intimated by the servants of the company to meet the plaintiffs' wishes as far as was consistent with the arrangements of the company. There was no contract that the train should reach its destination at any particular time. Suppose a man, having obtained a lucrative appointment in India, delays starting to Southampton to meet the steam-packet which is to

(1) 5 H. & N. 875; 29 L. J. (Ex.) 441: affirmed in error, 3 H. & C. 337.

convey him to Alexandria until the last train,—would the company be liable to him in damages equivalent to the loss of his appointment, if, in consequence of some negligence on the part of their servants in the course of the journey, the train failed to arrive at Southampton until after the departure of the packet, merely because the traveller tells the clerk when he takes his ticket that he must arrive in Southampton by a particular time, and is informed by the clerk that the train will be there by the time specified? To succeed here, the plaintiffs' argument must go that length.

T. Jones, Q.C., and *J. A. Russell*, in support of the rule. The first question is, whether there was evidence to go to a jury (taking the parol evidence tendered as supplementing the written evidence) of the contract declared on. It may be conceded that the consignment-note was primâ facie and pregnant evidence of the contract. The contention on the part of the plaintiffs at the trial was, and will be now, that that was not the contract upon which the goods were carried. This rests upon the familiar principle laid down in *Pym* v. *Campbell*. (1) The whole effect of the correspondence is explained and controlled by the statement contained in the first letter, viz. that the meat was to be in London "not later than two o'clock in the morning." There was abundant evidence for the jury of the contract stated in the declaration,—at all events in the second count. Then, assuming that the plaintiffs failed to make out the special contract declared on, it is submitted that the condition relied on by the defendants is unreasonable and void. In *M'Manus* v. *Lancashire and Yorkshire Railway Company* (2), where it was held by the Exchequer Chamber, reversing the decision of the Court of Exchequer (3), that a condition that the company "would not be responsible for any injury or damage, however caused," was unreasonable and void, Williams, J., said: "It is unreasonable that the company should stipulate for exemption from liability for the consequences of their own negligence, however gross, or misconduct, however flagrant; and that is what the condition in question professes to do." But, in *Beal* v. *South Devon Railway*

(1) 6 E. & B. 370; 25 L. J. (Q.B.) 277.
(2) 4 H. & N. 327; 28 L. J. (Ex.) 353.
(3) 2 H. & N. 693; 27 L. J. (Ex.) 201.

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Company (1), the condition was held to be good and reasonable, because it left the company liable for gross negligence.

[WILLES, J. Any negligence is *gross* in one who undertakes a duty, and fails to perform it. The term "gross negligence" is applied to the case of a gratuitous bailee, who is not liable unless he fails to exercise the degree of skill which he possesses.]

Crompton, J., delivering the judgment of the Exchequer Chamber in *Beal* v. *South Devon Railway Company* (2), says: "We think that this was not an unreasonable condition with reference to carrying a perishable commodity [fish], especially where, as in the present case, the company were likely to be called upon to carry large quantities at unexpected times, and where a very slight delay might cause the loss of the market, or the entire or partial destruction of the goods consigned. In the case of a carrier or other agent holding himself out for the careful and skilful performance of a particular duty, gross negligence includes the want of that reasonable care, skill, and expedition which may properly be expected from persons so holding themselves out, and their servants." In *Gregory* v. *West Midland Railway Company* (3) and *Allday* v. *Great Western Railway Company* (4) conditions like this, professing to absolve the company from negligence of any sort in the carriage of animals or goods, were also held to be unreasonable and void. The effect of this condition is, that, however negligent the company may be in the carriage of the goods, however unreasonable the delay in the course of the journey, the company shall not be responsible for the loss of market. That is clearly unreasonable.

BOVILL, C.J. I am of opinion that the nonsuit in this case was right. The first count stated the contract to be to carry the meat to London by a certain time in the morning, and there deliver it; in substance, to deliver it in time for the market. The mode in which it was sought to establish that contract was by the production of certain letters which passsd in the year 1864 between the

(1) 5 H. & N. 875; 29 L. J. (Ex.) 441: affirmed in error, 3 H. & C. 337.

(2) 3 H. & C. 341.

(3) 2 H. & C. 944; 33 L. J. (Ex.) 155, 10 Jur. (N.S.) 243.

(4) 5 B. & S. 903; 34 L. J. (Q.B.) 5 11 Jur. (N.S.) 12.

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plaintiffs and the traffic-manager of the company. I have no doubt it was the wish and expectation of the plaintiffs and also of the company that the meat would arrive in time for market. But there was no contract that it should arrive by that time. It is common knowledge that extraordinary efforts are made on the part of railway companies to attain perfect regularity and exactness in the departure and arrival of trains. But, so far as concerns passenger trains, the companies almost invariably protect themselves against the consequences of any irregularity, by inserting notices in their time-tables that they do not warrant that the trains will arrive and depart at the precise times indicated. (1) No objection is made here that the meat did not go by a particular train. So far the contract of the company was performed. Nor is there any complaint of default in the delivery of the meat after its arrival in London. Mr. Jones admits that the parol evidence which was rejected was to the same effect as the correspondence: and that is in accordance with what the learned judge reports to us. Being against the plaintiffs as to the effect of the correspondence, I am of opinion that the other question does not arise. The contract then would depend upon the consignment-note; and that expressly negatives any such contract as that alleged in the first count. Upon the second count, the question raised at the trial was as to whether the condition at the back of the consignment-note was a reasonable one. Whether rightly or wrongly, the learned judge thought the condition reasonable. If we thought it unreasonable, we should probably have enabled the plaintiffs to raise the question in some way. By the Railway and Canal Traffic Act, 17 & 18 Vict. c. 31, railway companies are authorized to impose conditions in their contracts to carry, subject to their being reasonable. The condition now before us does not profess to absolve the company from all liability in respect of the carriage of goods of a particular kind, but only to relieve them from the consequences of loss of market. In my judgment, it is competent to railway companies or other common carriers to say that they will decline to carry particular goods except upon condition that they shall not be liable for the loss of market. There is nothing unreasonable in that. The charge for carriage would

(1) See *Hurst* v. *Great Western Railway Company*, 19 C. B. (N.S.) 310; 34 L. J. (C.P.) 264.

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be regulated accordingly. To hold otherwise might involve railway companies in consequences most ruinous. I think the nonsuit was right, and that this rule must be discharged.

WILLES, J. I am of the same opinion. It is clear to my mind that the letters of 1864 amount to no more than giving the plaintiffs the privilege of having their goods carried by a particular train, and not to a warranty that they should arrive by any particular time. With respect to the condition, it seems to me to be reasonable that the company should protect themselves against liability for extraordinary damage from loss of market. It was indeed held in one case (1) that, in estimating the damages for detention of goods, the loss of the season might be taken into consideration; but that was merely as a mode of ascertaining the diminution in value of the article by reason of the delay. The loss of market, which may depend on an hour, is a very different thing. The railway company do not warrant that their trains will arrive at their destination at a particular time. They clearly would not be liable unless they accepted the goods with notice that their arrival by a certain time was essential: and it would be a reasonable thing for the officers of the company to say that they will not take them with such a notice. The case put by Mr. Quain of the Indian appointment is quite conclusive. This condition, which guards against such a liability, is to my mind a reasonable condition.

KEATING, J. I entirely agree in the construction which my Lord and my Brother Willes have put upon the correspondence which took place in 1864. The utmost extent of the contract to be gathered from it is, that the trains would stop at a particular station to take up the plaintiffs' meat: and there is no complaint that the trains did not stop. The only other question is as to the reasonableness of the condition. If the contract between the parties was upon the consignment-note, it is not that upon which the plaintiffs proceeded. Reliance was placed upon the plaintiffs' representations to the station-master at Settle at the commence-

(1) *Wilson* v. *Lancashire and Yorkshire Railway Company*, 9 C. B. (N.S.) 632; 30 L. J. (C.P.) 232.

ment of the dealings in 1864, of their object in having the goods forwarded by the particular train. Surely it is but just and reasonable that a carrier should be able so to qualify his contract as to secure himself against a liability to damages for loss of market. I think the nonsuit was right.

MONTAGUE SMITH, J. I also think the plaintiffs were properly nonsuited. The substantial question they went down to try was whether or not there was a special contract on the part of the company to carry their meat so that it should be delivered in London by a particular time. For this purpose a long correspondence was put in, which in my opinion failed to prove any such contract. The utmost it could amount to was, that the meat should start from Settle by a train which under ordinary circumstances might be expected to arrive in London at a certain hour. The question whether those letters contradict the contract contained in the consignment-note does not arise. I am disposed to think that the consignment-note was the contract between the parties. It contains all the terms upon which the meat was to be carried. It would be a strong thing to say that the plaintiffs might contradict that by evidence of matters dehors the contract. In *Malpas* v. *South Western Railway Company* (1), this Court expressly guarded itself against admitting any such doctrine. The price of carriage not being fixed by the contract in that case, evidence was necessarily given to supply the price, and that involved the question what was to be the terminus of the journey. As to the reasonableness of the condition here, I entirely concur with the rest of the Court. It seeks to exclude a particular class of damage, viz. loss of market. It seems to me that the company might very reasonably say, "We are willing to carry your meat by a particular train; but we will not consent to be responsible for any profit you may be deprived of by reason of an accidental loss of market." That leaves open the question whether they would not be liable for any general negligence. I see nothing to prevent the plaintiffs from recovering for any general damage they may have sustained, if the detention or delay has been caused by the negligence of the company's servants. But the plaintiffs

(1) Law Rep. 1 C. P. 336; 12 Jur. (N.S.) 271

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did not put their case in that way. I think the nonsuit was quite right.

Rule discharged.

Attorneys for plaintiffs: *H. T. Naters, for H. Robinson, Settle.*

Attorneys for defendants: *Bell, Brodrick, & Co., for Rawson, Best, & Braithwaite, Leeds.*

Jan. 29.

PAYNTER AND OTHERS *v.* JAMES.

Ship and Shipping—Charterparty, Construction of—Freight payable "on right Delivery of Cargo"—Concurrent Acts.

By the terms of a bill of lading freight was to be paid "one third in cash on arrival at B., and two thirds *on right delivery of the cargo*, by good and approved bills payable in London at four months, or cash, deducting usual interest, at the option of the shippers." The vessel arrived at B. The one third freight was paid, and the consignee of the cargo declared his election to pay the remaining two thirds in cash less interest:—

Held, that the delivery of the cargo and payment of the balance of the freight were to be concurrent acts, and that the master was not bound to deliver the cargo unless the consignee paid or was ready and willing at the same time to pay the balance of the freight.

THE first count of the declaration stated that, by the contract between the plaintiffs and Young & Co., contained in a bill of lading, the plaintiffs agreed with Young & Co. to deliver to their order or to their assigns in Bristol, certain goods therein mentioned to have been shipped by Young & Co., in good order and well conditioned, on board the plaintiffs' ship called the *Nimrod*, in the like good order and condition as they were in when so shipped (certain accidents and perils therein being excepted), and Young & Co. by the same contract agreed with the plaintiffs to pay freight for the said goods as per an agreement in the bill of lading referred to, being, as the plaintiffs alleged, an agreement contained in a certain charterparty between Young & Co. and the plaintiffs, whereby it was agreed that the amount of freight should be as therein specified, and paid one third in cash on arrival at Bristol aforesaid, and two thirds *on right delivery of the cargo of the said ship* (which cargo comprised the said goods), *by good and*

approved bills payable in London at four months following, *or cash*, deducting usual interest, *at the option of Young & Co.;* that, before delivery of any part of the goods in Bristol, Young & Co indorsed the bill of lading to the defendant, and thereby ordered the delivery of the goods to the defendant; that the property in the goods passed to the defendant upon the said indorsement; that, on arrival of the goods at Bristol, the defendant, and Young & Co. by the defendant as their authorized agent in that behalf, exercised the said option as to the mode in which the said two thirds of the freight should be paid, by electing, and he, and they by him as their authorized agent, elected to pay the said two thirds in cash, deducting 2½ per cent. for four months, which rate of interest, by agreement for a good consideration between the plaintiffs and defendant, was agreed should be deducted as and for the said usual interest in the charterparty mentioned: Averment of performance and lapse of all conditions and times: First breach, that the defendant had not paid the said two thirds, or any part thereof, either by bills or cash, deducting interest at the said rate, or in any other manner, and that the said two thirds were wholly unpaid: Second breach, that the defendant did not pay the one third which was payable on arrival at Bristol, and that 36*l.* 5*s.*, part of the said one third, at the commencement of the suit was in arrear contrary to the contract in the bill of lading.

The second count stated that it was agreed between the plaintiffs and the defendant that the plaintiffs should deliver to the defendant certain goods on which certain freight was payable, and that the defendant should pay to the plaintiffs the said freight, one third in cash, and two thirds in cash with 2½ per cent. discount: Averment of the performance and lapse of all conditions and times: Breach, that the defendant had only paid part of the said one third, and that the residue (36*l.* 5*s.*) of the said one third before suit was in arrear, contrary to the agreement, and that the defendant had not paid any part of the other two thirds.

The third count was for money payable for and in respect of the plaintiffs' having delivered to the defendant certain goods whereon the plaintiffs had a lien for freight; and thereby lost the said lien, and for freight of goods by the plaintiffs carried in ships for the defendant at his request, and on accounts stated.

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The fourth count repeated all the allegations in the first count down to and inclusive of the allegation that the property in the said goods passed to the defendant upon the indorsement of the bill of lading, and alleged that the ship with the goods on board arrived in Bristol under the charterparty and bill of lading, and that all conditions had been performed and times elapsed, and assigned for breach that the defendant did not pay the one third in cash on arrival, but only paid part thereof, and did not pay any part of the other two thirds.

The fifth count repeated all the allegations which by reference to the first count were incorporated in the fourth, and also repeated the allegations in the fourth count down to and inclusive of that as to the plaintiffs being entitled to have the defendant pay to them the said freight according to the bill of lading and charterparty; and assigned for breach that neither the defendant nor Young & Co. did or would exercise the said option as to the mode in which the two thirds were to be paid, or pay the same, or any part thereof, or pay the one third, but only paid a part of the one third, and the residue remained unpaid.

The defendant pleaded,—first, as to 36*l.* 5*s.*, the unpaid portion of the one third freight in the first count, to the same sum part of the one third freight in the second count, to the same sum parcel &c. in the third count, and to the unpaid portion of the one third freight claimed in the fourth and fifth counts, payment into court of 36*l.* 10*s.*,—secondly, to the first and fourth counts, except as to so much as in the first plea pleaded to, that neither Young & Co. nor the defendant exercised the said option,—thirdly, to the second count, except as in the second plea excepted, that it was not agreed as alleged,—fourthly, to the first, second, fourth, and fifth counts, except as aforesaid, that the plaintiffs were not ready and willing to deliver the cargo,—fifthly, to the residue, never indebted.

The plaintiffs joined issue on all the pleas except the first: and, as to the first plea, they accepted the 36*l.* 10*s.* in satisfaction of the claim to which that plea was pleaded.

The cause was tried before Pigott, B., at the last summer assizes at Cardiff. The plaintiffs were the owners of the ship *Nimrod*. The defendant was a merchant at Teignmouth. The *Nimrod* was

chartered by Young & Co. for a voyage from Quebec to Liverpool; the charterparty containing the following stipulation as to the mode in which the freight was to be paid,—"Freight to be paid, one third in cash on arrival at Bristol, and two thirds on right delivery of the cargo of the said ship, by good and approved bills payable in London, at four months following, *or cash*, deducting usual interest, at the option of Young & Co." The *Nimrod* arrived at Bristol on the 17th of October, 1865, and the defendant, the assignee of the bill of lading of certain timber, a portion of the cargo, had notice thereof, and paid 400*l.* on account of the one third freight which by the terms of the charterparty was payable on the ship's arrival, and agreed to pay the remaining two thirds in cash on being allowed 2½ per cent. discount, the usual rate of interest at the time being assumed to be 7½ per cent. per annum; and he directed that a certain portion of the timber should be delivered to persons named. On the 21st of October, the defendant received an intimation from the plaintiffs' brokers that a portion of the cargo had been delivered, and that no more would be delivered unless they received 600*l.* on account of the unpaid portion of the freight. To this the defendant replied on the 25th that he would pay no more until the whole of the cargo was delivered, and that he had appointed Messrs. May & Co., merchants at Bristol, to receive the remainder of the timber, and would hold the captain responsible for any delay. Some further correspondence took place; and on the 30th the captain (Paynter) gave the defendant notice that he was ready to deliver the remainder of the cargo on payment of the balance of freight according to the terms of the charterparty. The defendant replied that the freight was not payable under the charterparty until the goods were delivered, and he refused to pay before. At this time the whole of the timber had been discharged and was rafted alongside the ship.

The jury found that the defendant exercised his option to pay cash, that the plaintiffs were not ready to deliver the cargo without cash, but were on being paid cash; and that they unloaded and rafted the timber, as stated in the evidence of one of the witnesses. A verdict was thereupon entered for the plaintiffs for 992*l.*, with leave to the defendants to move,—the Court to draw inferences not inconsistent with the findings.

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Bowen (Nov. 6, 1866) obtained a rule nisi to enter a verdict for the defendant, on the ground "that he was under no obligation to pre-pay the residue of the freight before the delivery of the cargo to him, and that the plaintiffs were not ready or willing to deliver the cargo except on a pre-payment of freight, to which they were not entitled." He cited *Moeller* v. *Young*. (1)

H. Giffard, Q.C., and *Michael* (Jan. 27), shewed cause, and contended that the case was disposed of by the finding of the jury; for that, the delivery of the goods and payment of the freight being by the terms of the charterparty concurrent acts, the plaintiffs were not bound to deliver unless the defendant was ready to pay.

Bowen, G. B. Hughes, and *Watkin Williams*, in support of the rule. The jury having found that the defendant exercised his option to pay the remaining two thirds of the freight in cash, the case rests upon the plaintiffs' readiness and willingness to deliver the cargo. The finding of the jury as to that is, that the plaintiffs were not ready and willing to deliver the timber without payment of the freight, but that they were ready to deliver it *on* payment. Now, the primary meaning of "on" is "after": see Johnson's and Webster's Dictionaries. Where an order is made for leave to amend "upon payment of costs," the payment of the costs is a condition precedent: *Levy* v. *Drew*. (2) The plaintiffs, therefore, had no right to impose the term they did. If they were not entitled to pre-payment, they were not ready and willing to deliver. One third of the freight was by the charterparty to be paid before delivery of any part of the cargo, and the remaining two thirds *on* delivery. The reason of the thing is, that that means *after* delivery. "Freight being the price of safe carriage and delivery of the subject of bailment at the destined port, performance of the contract is a condition precedent to any right of the carrier to recover the reward:" Maclachlan on Shipping, 395; *Davidson* v. *Gwynne* (3); *Ritchie* v. *Atkinson*. (4) In *Foster* v. *Colby* (5), a vessel was chartered from Liverpool to Calcutta and home for the sum of 7000*l*., the freight to be paid, "1250*l*. on the vessel clear-

(1) 5 E. & B. 7; 24 L. J. (Q.B.) 217.

(2) 5 D. & L. 307.

(3) 12 East, 381.

(4) 10 East, 295, 309.

(5) 3 H. & N. 705; 28 L. J. (Ex.) 81.

ing from Liverpool, and 1000*l.* on delivery of the outward cargo at Calcutta, and the remainder in cash two months from the vessel's report inwards, and *after* right delivery of the cargo, or under discount at 5 per cent. per annum, at freighter's option:" and it was held that the charterparty did not create any lien in respect of that part of the freight which was payable at two months after the vessel's report inwards. Even if the delivery of the cargo and payment of the residue of the freight were to be concurrent acts, still the plaintiffs could not sue for the freight until they had performed their contract by delivering the cargo.

BOVILL, C.J. Some embarrassment has arisen from the form of the rule in this case. The plaintiffs altogether repudiate its terms, and say they never contended that there was any obligation on the defendant to pre-pay the two thirds freight. What, then, was the point reserved? Looking at the report of the learned judge and at the finding of the jury, I have come to the conclusion that no such point was reserved or intended to be reserved as that stated in the rule. We must, therefore, take the charterparty and the finding, and endeavour to put a reasonable construction upon both. No doubt the main question is upon the meaning of the clause in the charterparty as to the payment of freight. The words are, "freight to be paid, one third in cash on arrival at Bristol, and two thirds on right delivery of the cargo, by approved bills payable in London, or cash, at the option of the charterers." No question arises upon the first part, the one third having been paid; and, the consignee having, as the jury found, elected to pay the two thirds in cash, nothing arises upon that option. But the question raised and argued before us was as to the meaning of the words "on right delivery of the cargo." The contention on the part of the defendant at the trial was that the delivery of the cargo and payment of the residue of the freight were not to be concurrent acts, but that he was entitled to have the cargo delivered before his obligation to pay the freight arose. That having been the contention of the defendant at the trial, his counsel now shift their ground and contend that the two acts were to be concurrent, and that the plaintiffs had no right to insist upon payment *before* delivery of the cargo. Mr. Hughes has cited authorities to shew

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that the word "on" imports a condition precedent. But, in a case which has been handed to me by my Brother Willes, of *Reg.* v. *Humphery* (1), I find that the word "upon" has received a judicial construction which is inconsistent with that argument. The statute 9 Geo. 4, c. 17, ss. 2, 3, requires that every person who shall be placed, elected, or chosen in or to the office of alderman, &c., shall, within one calendar month next before or *upon* his admission into such office, make and subscribe a certain declaration before certain persons; and s. 4 enacts that, if he shall omit or neglect to make and subscribe the said declaration in manner above-mentioned, such placing, election, or choice shall be void. The Court of Queen's Bench held that the election was not void by the party's refusal to make the declaration or state whether or not he would do so, unless he had first been admitted into the office by swearing in. But their judgment was reversed by the Exchequer Chamber; and Tindal, C.J., in delivering the judgment in error, says (2): "The words of the act 'upon his admission,' do not, as it appears to us, mean *after* the admission has taken place, but *upon the occasion of*, or *at the time of* his admission. The words of that section (s. 2) shew the intention of the legislature to have been that the space of time commencing at the distance of one calendar month next before, and terminating with, the act of admission, should be the limit or period within which the declaration was required to be made; so that, if not made at an earlier time, the latest opportunity of making it would be at the same time and place at which the oath of office was administered, and before the same persons. In effect, the making of the declaration does, by virtue of those words, form a part of the act of admission, and is an essential requisite to the being permitted to exercise the corporate office. And we hold it therefore to be unnecessary to refer to instances of the legal meaning of the word 'upon,' which, in different cases, may undoubtedly either mean *before* the act done to which it relates, or *simultaneously with* the act done, or *after* the act done, according as reason and good sense require the interpretation, with reference to the context and the subject-matter of the enactment." That is a very clear statement of the various meanings of the words "on" or "upon." Applying that doctrine here, and looking at the

(1) 10 Ad. & E. 335. (2) 10 Ad. & E. at p. 369.

nature of the instrument we are construing, I cannot entertain a doubt. The ship-owner has a lien for the freight. Could it be reasonably contended that he meant to give up that lien? Is it not, from the nature of the thing, more consistent that the two acts are to be concurrent,—that, at the time of the payment, the ship-owner shall be ready to deliver the cargo? I should have imagined that the sense of the mercantile world would have been clear upon the subject. But, if further authority be wanting, there is a recent case before the Privy Council, for which also I am indebted to my Brother Willes, and which seems to me to be almost in point. That case is *Black* v. *Rose*. (1) There, by a charterparty it was provided that freight should be paid at a certain rate on the quantity safely delivered, "the cargo to be taken alongside, and to be taken from the ship's tackle at the port of discharge, free of risk and expense to the ship." Disputes having arisen during the delivery of the cargo, the master required payment of the freight for the amount of cargo delivered each day over the ship's side into the consignees' boats, and refused to deliver any more cargo, on the consignees refusing to pay on delivery as required. The Supreme Court of Ceylon held that the master was justified in refusing to discharge the cargo without payment at the ship's side of the freight each day on the quantity delivered; for that his lien would be lost by delivery of the goods without payment. And the Privy Council affirmed that decision. That appears to me to determine this question, if authority were necessary. The merchant is not entitled to have the goods unless he is ready to pay the freight: nor, on the other hand, is the ship-owner entitled to the freight unless he is ready to deliver the cargo. The finding of the jury is said to be ambiguous. As the learned judge reports to us, they found "that the plaintiffs were not ready to deliver the cargo without cash, but were on being paid cash, and unloaded and rafted the timber, as stated in the evidence of Elliott." What I understand from that, looking at the evidence, and at what was contended on the part of the plaintiffs, is, not that the plaintiffs insisted on pre-payment of the freight, but that they were ready to deliver the cargo if the defendant had been ready to pay the freight at the time of

(1) 2 Moore P. C. (N.S.) 277.

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delivery. The facts clearly shewed that the plaintiffs were ready and willing to deliver: they had taken the timber out of the ship and rafted it, and were anxious to get rid of it: but the defendant was not ready to pay the freight: he had not the money. Upon principle as well as upon authority I feel bound to decide the substantial question in favour of the plaintiffs.

WILLES, J. Not having heard the whole of the argument, I take no part in the decision. I will only say that, so far as I understand the case, I see no reason for dissenting from the opinion expressed by my Lord.

MONTAGUE SMITH, J. I agree with my Lord that the plaintiffs are entitled to retain their verdict. The question turns upon the construction of the provision in the charterparty as to the payment of freight, viz. "one third in cash on arrival at Bristol, and two thirds on right delivery of the cargo." It was contended on the part of the defendant at the trial that the ship-owners were bound to deliver the cargo before payment of the two thirds freight, thus making the delivery a condition precedent to their right to demand the freight, and leaving them to their remedy by action, their lien being gone. That clearly is not the true construction of the contract. The two acts are to be concurrent, —to be performed as simultaneously as the nature of the thing will admit of. *Foster* v. *Colby* (1), which was cited for the defendant, was a perfectly correct decision, but upon a charterparty in entirely different terms from this. There, the freight was to be paid, "1250*l.* on vessel clearing from Liverpool, and 1000*l.* on delivery of the outward cargo at Calcutta, *the remainder in cash two months from the vessel's report inwards, and after right delivery of the cargo.*" It is plain that the ship-owner there stipulated for delivery of the cargo before payment of the residue of the freight. The cargo was to be delivered; and the payment was to be in cash two months after the vessel's report inwards. The lien was gone. Then it is said that the plaintiffs were not ready to deliver the cargo, and demanded payment of the freight before delivery. It is clear from the evidence, and distinctly

(1) 3 H. & N. 705; 28 L. J. (Ex.) 81.

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found by the jury, that the plaintiffs were ready to deliver on being paid cash. Where two acts are to be concurrent, there must be a concurrent readiness on both sides,—on the one to deliver, and on the other to pay. Each party is entitled to see that the other is ready to do his part: and it is for the jury to say which is in default. It seems to me here that there was abundant to satisfy the jury that the plaintiffs were ready and willing to deliver the timber, and that the defendant was neither willing nor ready to pay the freight. I therefore think the plaintiffs were entitled to succeed. It is clear that where two acts are concurrent, actual performance is not necessary to enable one party to maintain an action; but that it is enough to shew a readiness to perform his part. For this the note to *Pordage* v. *Cole* (1) is a sufficient authority.

Rule discharged.

Attorneys for plaintiffs: *Williamson & Hill, for J. P. Ingledew, Cardiff.*

Attorneys for defendant: *Cotterill & Sons.*

[IN THE EXCHEQUER CHAMBER.]

Feb. 4.

KIDSTON AND OTHERS *v.* THE EMPIRE MARINE INSURANCE COMPANY.

Ship and Shipping—Marine Insurance—Constructive total loss of Freight—Suing and Labouring Clause—Particular Average—Evidence of Usage amongst Underwriters.

The plaintiffs effected an insurance with the defendants on the chartered freight of a ship, for a voyage from C. to E. The policy contained the usual suing and labouring clause, and a warranty against particular average. During the voyage the ship was so much damaged in a storm that it put into R., where it became a total wreck. The goods were landed and forwarded in another ship to their destination, at an expense less than the chartered freight, and on their arrival the chartered freight was paid. In an action to recover from the underwriters a proportionate part of the expense incurred in forwarding the goods by the second ship:—

Held, that there would have been a total loss of the freight at R. if the goods

(1) 1 Wms. Saund. 320 *e.* 5.

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had not been forwarded, and that the plaintiffs were entitled to recover the sum claimed under the suing and labouring clause of the policy.

At the trial, evidence was given that expenses incurred in preserving the subject-matter of insurance were not "particular average," but "particular charges," as those terms were understood in the business of marine insurance:—

Held, that this evidence was admissible to shew the mode in which such expenses were treated by mercantile men; but that the usage proved by it was in affirmance of the common law, and did not control or vary the language of the policy.

APPEAL from the decision of the Court of Common Pleas, discharging a rule to enter a verdict for the defendants or a nonsuit. (1)

The plaintiffs had effected an insurance with the defendants on the chartered freight, valued at 5000*l.*, of a ship *Sebastopol*, on a voyage from the Chincha Islands to the United Kingdom. The policy contained the usual suing and labouring clause, and a warranty against particular average. The ship having been damaged in a storm put in to Rio, where she became totally lost, but the goods were landed and forwarded to their destination in another vessel, the *Caprice*, at a cost of 2467*l.* 11*s.* 10*d.*, and the chartered freight was then paid to the plaintiffs. The action was brought to recover from the defendants a proportionate part of the sum so expended in forwarding the goods from Rio.

Evidence was given at the trial of the meaning of particular average as understood among merchants. (2)

The facts are stated at length in the report of the case in the court below.

Mellish, Q.C. (*Cohen* with him), for the defendants. There was not in fact a total loss of the freight at Rio; nor could there have been even if the master had not forwarded the goods. It has been decided in *Rosetto* v. *Gurney* (3) that there is no total loss of *goods* if the cost of forwarding them would be less than the value of the goods when at their destination, and that it makes no difference whether they are actually forwarded or not; and in *Farnworth* v. *Hyde* (4), that in calculating the cost of forwarding them you are to take into account only the extra cost occasioned by the loss of the

(1) See the report of this case below, Law Rep. 1 C. P. 535. 12 Jur. N.S. 665.

(2) See Law Rep. 1 C. P. at p. 538.

(3) 11 C. B. 176; 20 L. J. (C.P.) 257.

(4) Law Rep. 2 C. P. 204; 36 L. J. (C.P.) 33. 12 Jur. N.S. 997

original ship. By parity of reasoning, in the case of an insurance on freight, if the ship be lost at an intermediate port and, the goods being saved, the freight is still capable of being earned by forwarding the goods in another ship, there is no total loss, if this can be done at a less cost than the value of the original freight, whether in fact the goods are forwarded and the freight earned or not. The decision in the case of an insurance on goods does not at all turn on the fact that they still exist in specie, because, although they do so, yet if the cost of forwarding them would exceed their value when forwarded, they are considered as totally lost. The extent of the partial loss is the same, whether the goods are forwarded or not; just as in the case of a ship which is sold instead of being repaired, the extent to which the insurers are liable is not affected; only in the one case the amount of their liability is a matter of inference, and in the other it is known. The contract of insurance is one of indemnity, and the true question is, how much has been necessarily lost through perils of the sea. If the master might have saved one half the freight by forwarding the goods, and has not done so, that half has been lost by his own negligence, and not by perils of the sea; and the insurer, therefore, is not liable for it; and the loss is only a partial one. The master has three courses: he may either abandon the goods and freight; or send the goods on and earn the whole freight, at the expense of chartering a fresh ship; or he may enter into a new contract, to be paid freight pro ratâ. It cannot affect the liability of the underwriter which of these three courses he pursues.

[LUSH, J. Is the master bound to forward the goods? Unless he does so there is a total loss of the freight; do you not, therefore, import something more than the proximate cause of loss into the case when you say that the master could render the loss a partial one by sending the goods on?]

The master, upon principle, is bound to send on the goods, though that has never been decided. In *Shipton* v. *Thornton* (1) the Court expressly abstained from the decision of that question; but in Phillips on Insurance, s. 1632, it is said: "If the ship is rendered unnavigable and cannot be repaired for the prosecution of the voyage, and another can be procured within a reasonable time and distance,

(1) 9 A. & E. 314.

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and the master has means to procure such other at an expense materially less than the amount of the freight for the voyage, the underwriter on freights or profits is not liable to be prejudiced by the master's neglect to tranship, any more than the underwriter upon the cargo, and the loss will be adjusted as if the cargo had been transhipped and forwarded, and will be partial or total, according to the amount of the loss." He refers to *Jordan* v. *Warren Insurance Company*. (1) Parsons on Maritime Law, vol. 2, p. 386, says: "If, although the ship itself be wrecked or otherwise lost, the master can tranship and forward the goods by reasonable endeavours, and at a reasonable cost, we have seen that it is his duty to do so; and if he neglects this duty the insurer is chargeable only in the same way and to the same extent as if the duty had been performed, and the loss will be partial or total according to its amount when so adjusted. . . . It has been held that if the vessel is lost, and the goods cannot be sent forward at an expense less than the original freight, there is a total loss of freight." He cites *Willard* v. *Millers' and Manufacturers' Insurance Company*. (2) If the master had agreed to be paid pro ratâ there would never have been in fact a total loss; and whether he received part, or received the whole and paid over part, can make no difference. The second ship has a lien for the whole agreed freight, and, on being paid, the master of it retains his own freight, and pays over the rest to the master of the vessel originally chartered. Is not then the money so retained a part of the chartered freight which is lost, and that by perils of the sea? and is there not, therefore, a partial loss only of the chartered freight?

Then, as to the suing and labouring clause, this can only apply if there would, but for the labouring, have been a loss, for which the underwriters would have been liable; if this conclusion be right, the loss would have been only partial, even if the goods had not been sent on, and the underwriters therefore would not have been liable. Since, therefore, the expense incurred in forwarding the goods has not saved the underwriters from any liability, the expense so incurred cannot be recovered under the suing and labouring clause. The meaning of the clause was considered

(1) 1 Storey's R. 342. (2) 24 Mo. 561.

in *Great Indian Peninsular Railway Company* v. *Saunders.* (1) There it was held that expenses similar to those claimed in the present action could not be recovered in the case of a policy on goods. The decision was, in fact, that such expenses are the losses occasioned to the owner by perils of the sea, which the underwriter would, under an ordinary policy, be liable to repay, but more than which he would not be liable for, whether the goods were in fact forwarded and those expenses incurred or not; that they amounted therefore to particular average, and were excluded by a special warranty against particular average, such as that in the present case. The suing and labouring clause applies only to expenses incurred in saving the subject matter when it exists, and is in peril, and in many cases may be recovered in addition to a total loss; but the expenses claimed in this action were incurred in earning the freight, and not in preserving it when existing, and they therefore formed a diminution of the freight itself, and were not expenses incurred in preserving it complete.

It was contended in the court below also that the expenses incurred were not of a kind to be within the suing and labouring clause; but Willes, J., in delivering the judgment of that Court, assumes that any unusual labour for the purpose of carrying out the voyage and earning the freight would be a suing and labouring within the meaning of the clause; whereas it was held in *Great Indian Peninsular Railway Company* v. *Saunders* (1) that only labour undergone for the purpose of saving the thing insured from impending loss is within that clause. Here, it is true, the claim is for extra labour, incurred through perils of the sea, but it was for the purpose of completing the voyage, and not of saving the thing insured against from peril. Under the second head of the argument, Willes, J., says that the clause would be inapplicable if limited to cases in which the insured had abandoned, or was entitled to abandon, the thing insured; and he therefore appears to think this is not a case of total loss in which the insured might have abandoned the thing insured; but if not, the suing and labouring clause would not apply on account of the warranty against particular average. In an ordinary case no doubt the

(1) 1 B. & S. 41; 30 L. J. (Q.B.) 218; in error, 2 B. & S. 266; 31 L. J. (Q.B.) 206.

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assured might recover under the clause expenses incurred in diminishing the loss as well as in preventing a total loss, but not under a policy like the present, when it is only a total loss that is insured against. Again, the learned judge says that there is no reference to abandonment in the commencement of the suing and labouring clause in an English policy; but what explanation can be given of the words "it *shall be lawful* for the assured to sue and labour" except that given by Arnould on Insurance, 3rd ed. p. 232, that it had been supposed that so dealing with the subject of insurance might deprive the assured of their right of abandonment? It is not true that on the construction contended for, the suing and labouring clause would have no application. Expenses incurred, for example, in endeavours to forward the goods, which failed, might be recovered under it. Willes, J., further says that the cases of *Great Indian Peninsular Railway Company* v. *Saunders* (1) and *Booth* v. *Gair* (2) did not decide the meaning of particular average; but Blackburn, J., in the former, said: "Mr. James contended that particular average bore a more restricted meaning; that it was confined to losses arising from injury to or deterioration of the goods themselves, and did not include expenses incurred in relation to the goods, but we find no authority for this. . . . We think that we must put the same construction on this policy as if it had been expressed to be 'against total loss and general average only;'" and in the Exchequer Chamber Erle, C.J., said: "If it were necessary to go into that point I should clearly be of opinion that the words found in an instrument in common use should be taken according to the common understanding of them when so used. It is agreed that particular average has two meanings universally understood; that when taken with reference to the common memorandum clause it excludes certain expenses; but when taken with reference to the money to be paid by the underwriter it includes them." The decision in the court below cannot be reconciled with that case. According to the rules there laid down the present charges come strictly within the term "particular average."

Lastly, the custom, if proved, could not affect the question, as where a particular meaning has been affixed by the Courts to a

(1) 1 B. & S. 41; 30 L.J. (Q.B.) 218; in error, 2 B. & S. 266; 31 L.J. (Q.B.) 206.
(2) 15 C. B. (N.S.) 291; 33 L. J. (C.P.) 99.

known commercial term, such meaning cannot be set aside by any evidence of custom: *Edie* v. *East India Company* (1); *Hall* v. *Janson* (2); *Suse* v. *Pompe.* (3)

Edward James, Q.C. (*Sir G. Honyman, Q.C.*, with him), was not called on.

Cur. adv. vult.

Feb. 6. The judgment of the Court (Kelly, C.B., Channell, B., Mellor, J., Pigott, B., and Lush, J.), was delivered by

KELLY, C.B. In this action, which was on a policy upon freight, a question of great importance to the mercantile community has arisen, and has for the first time, at least in this country, received a judicial decision in the Court of Common Pleas, which decision is now under appeal before us, and which we are called upon to affirm or to reverse.

The facts are few and simple. The plaintiffs chartered the ship *Sebastopol* from the Chincha Islands to a port in Great Britain, and effected an insurance upon freight for 2000*l.* by the policy in question, the freight being valued at 5000*l.*; and the policy contained a warranty against particular average, with the well-known suing and labouring clause, as adopted in English insurances. The ship sailed from the Chincha Islands, and in rounding Cape Horn became so greatly damaged that she afterwards put into the port of Rio, where she became a wreck, and may be deemed to have been totally lost. The cargo of guano was landed and warehoused, and was afterwards shipped on board a vessel called the *Caprice*, chartered by the plaintiffs, and was forwarded in safety to its destined port in Great Britain, at an expense for freight of 2467*l.* 11*s.* 10*d.*

Under these circumstances the plaintiffs brought this action, with a count claiming for a total loss of freight, and another count for 1145*l.* 3*s.* 6*d.* under the suing and labouring clause, for the charges and expenses of conveying the cargo from Rio to this country. It was contended for the plaintiffs that when the ship had become a wreck, and the cargo had been landed at Rio, when no freight could be claimed by the law of England pro ratâ

(1) 1 W. Bl. 295. (2) 4 E. & B. 500; 24 L. J. (Q.B.) 97. 7 Jur. (N.S.) 571.
(3) 8 C. B. (N.S.) 538; 30 L. J. (C.P.) 75; 7 Jur. (N.S.) 1165

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itineris, that a total loss of freight had been incurred; and that inasmuch as the proportion of the homeward freight by the *Caprice* being a charge incurred in preserving the subject matter of the insurance, and so relieving the defendants, the underwriters, from their liability as for a total loss of freight, it was a charge within the suing and labouring clause, which the plaintiffs were entitled to recover. On the other hand it was insisted for the defendants that, inasmuch as the plaintiffs were able to forward the goods to England by another vessel, at an amount of freight substantially less than the entire freight, as valued under the policy, a partial loss only, and not a total loss of freight, had been incurred, which the warranty against particular average precluded the plaintiffs from recovering. It was argued that the master was bound, under the circumstances that had occurred, to forward the goods to England; that his ability to do so, and so to earn the whole of the freight, subject to a deduction of the cost of the conveyance from Rio to this country, made the case one of partial and not of total loss, and so within the particular average clause. We are of opinion, however, that upon the ship *Sebastopol* becoming a wreck at Rio, and the goods having been landed there, inasmuch as no freight pro ratâ itineris could be claimed, a total loss of freight had arisen, and that the expenses incurred in forwarding the goods to England by another ship were charges within the suing and labouring clause, incurred for the benefit of the underwriters to protect them against a claim for total loss of freight, to which they would have been liable but for the incurring of these charges, and that consequently the amount is recoverable under that clause in the policy.

The question raised by the defendants, whether the owner was bound, under these circumstances, to forward the goods to England, is attended with some difficulty and uncertainty. It has been much considered, and in effect decided, in America. Parsons, on Maritime Law, vol. ii. p. 385, lays it down "that there is a total loss of freight when the ship and cargo are totally lost, or the vessel becomes wholly unnavigable, or is subject to a detention of such a character as to break up the voyage. It is said, in some cases, that if the loss of the ship be only constructively total, that is, made so by abandonment, the owner may abandon also the freight,

and claim as for the total loss of it; but if, although the ship itself be wrecked and utterly lost, the master can re-ship and forward the goods by reasonable endeavours and at reasonable cost, we have seen that it is his duty to do so; and if he neglects this duty the insurer is chargeable only in the same way and to the same extent as if the duty had been performed, and the loss will be partial or total according to its amount when so adjusted."

It appears in a note that in a case reported, 9 Johnson 17, where the vessel was lost at an intermediate port, but the goods remained and were seized by the government, the underwriters were exempt from loss by seizure in port. It was held that if the goods could have been sent on, but for the seizure, the defendants were not liable. Kent, C.J., said: "The point is, whether it be a good defence in any case to an action on a policy for freight, that the shipowner refused or neglected to forward the goods by another vessel when he had it in his power. We have not met with any decided case on this point, but it appears to be reasonable and consistent with the principles of the contract that the insurers should in such case be discharged."

This has never been held to be law in this country, but it must be admitted that it is not unreasonable that if the owner of freight insured fails to earn it by any default of his own, he should be disentitled to recover it against the insurer. But it is unnecessary to decide this point; for whether or not a shipowner or charterer be under a legal obligation to forward the cargo by another ship to its destined port he is at all events at liberty to do so, and thus to earn his entire freight; and we think that, under a policy like this, he is entitled to claim the cost which he so incurs under the suing and labouring clause, where such a clause is to be found in the policy, on the ground that he has thereby preserved the subject matter of the insurance from total loss, to which it would otherwise have been liable upon the policy. It should seem, too, that the rule of law which in this country entitles the shipowner to recover these charges under an insurance like this against the underwriters is in strict accordance with sound policy. For if the master knows, where the ship has been lost and the cargo may be sent forward to its destined port, that his owner will be indem-

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nified in respect of the cost which he may incur in so forwarding the goods, he will have every inducement to save the property and complete his contract with the owner of the cargo; whereas, if the cost of the conveyance of the goods for the rest of the voyage is to fall upon his owner without recourse to the underwriters, he will be exposed to the temptation of evading the performance of what may at least be termed a moral duty, and may leave the cargo to its fate in the foreign port in which it may have been unshipped.

We are of opinion, therefore, that whether it be the duty or not of the master, under circumstances like these, to forward the cargo in another ship to its destined port, that upon the facts of this case there was a total loss of the freight when the ship had become a wreck, and the goods had been landed at Rio; and that the cost incurred by the master in shipping the goods by the *Caprice*, and causing them to be conveyed to this country, is a charge within the express terms of the suing and labouring clause, and that the amount, or the due proportion of it, is recoverable under that clause against the underwriters.

The cases of *Great Indian Peninsular Railway Company* v. *Saunders* (1) and of *Booth* v. *Gair* (2) have been pressed upon the attention of the Court, as shewing that a loss of this nature is a partial loss only, and cannot be recovered against the underwriters by reason of the warranty against particular average. But these were cases of insurance upon goods, to which the pro ratâ doctrine has no application, and where, the whole or a great portion of the goods still existing in specie, it was impossible to hold that a total loss had arisen. And Mr. Justice Blackburn appears to have marked the distinction between the case of goods and that of freight, and forborne to intimate any opinion upon the point which we have now to determine.

But another case from the United States has been cited under the high authority of Storey, and where it is supposed to have been held that, under circumstances like these, there was a partial and not a total loss of freight, and that the underwriters were not liable upon the policy; but this case of *Jordan* v. *Warren In-*

(1) 1 B. & S. 41; 30 L.J. (Q.B.) 218; in error, 2 B. & S. 266; 31 L.J. (Q.B.) 206.
(2) 15 C. B. (N.S.) 291; 33 L. J. (C.P.) 99.

surance Company (1) has really no application to the case before us. There the insurance was on freight from New Orleans to Havre; the ship was run aground and injured before it left the Mississippi, but returned to New Orleans, and after unshipping the cargo was completely repaired and reinstated, and might have taken the cargo on board again and completed the voyage to Havre; but the cargo, having been much damaged, was sold at New Orleans, under an arrangement between the parties, and the ship proceeded on another voyage, not to Havre, but to England. Under these circumstances the shipowner, who claimed as upon a total loss of freight, was held entitled to recover only upon a partial loss, that is to say, for the loss of freight upon some part of the cargo which had been destroyed before it was re-landed at New Orleans, and which therefore could never have earned freight at all by the completion of the voyage. No question was raised there concerning particular average, or the suing and labouring clause in a policy. The case, therefore, has no bearing upon the present; but it may be remarked that, where any claim to freight at all was treated as recoverable, it seemed to be upon the footing of a total loss reduced to a smaller amount by expenses incurred for the benefit of the underwriters, and spoken of as salvage.

It remains only to observe upon the evidence given in this case that expenses incurred in preserving the subject matter of insurance were designated as particular charges, and not as particular average. We think that this evidence in no wise controls or varies the language of the policy, and that it is admissible to shew the mode in which expenses of this nature are treated by mercantile men. But this evidence, or the usage which it proves, is in affirmance of the common law of England, which of itself defines the nature and character of these charges, and if rejected and struck out of the case would leave the question in the cause as it was before.

We think, therefore, on the whole, and upon the true construction of the policy, that on the destruction of the ship and the landing of the cargo at Rio there was a total loss of the freight, unless it could be averted by the forwarding of the cargo by

(1) 1 Story R. 342.

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another ship to Great Britain; that the forwarding the cargo by the *Caprice* was a particular charge within the true meaning of the suing and labouring clause, and not the conversion of total loss into a partial loss, which brought the case within the warranty against particular average; and that the due proportion of that particular charge, that charge being thus within the suing and labouring clause, and incurred for the benefit of the underwriters to preserve the subject of the insurance, and to prevent a total loss, is recoverable under the policy in this action.

The judgment of the Common Pleas must therefore be affirmed.

Judgment affirmed.

Attorneys for plaintiffs: *Thomas & Hollams.*

Attorneys for defendants: *Chester & Urquhart, for Lace & Co., Liverpool.*

Feb. 6.

[IN THE EXCHEQUER CHAMBER.]

CATTERALL *v.* HINDLE.

Principal and Agent—Payment—Question of Fact for Jury.

A. having purchased goods of B. through a broker, paid for them to the broker partly by an advance on his general account with the broker before the delivery of the goods, and partly by cash on a settlement of accounts after the delivery. The broker did not pay over the money to B., and became bankrupt. In an action by B. to recover from A. the price of the goods, except so much as had been paid in cash:—

Held, that it was a question of fact for the jury, whether payment to a broker in advance was a good payment as against the principal, depending on the custom of the trade; and that question not having been left to the jury, the Court ordered a new trial.

APPEAL from the decision of the Court of Common Pleas making absolute a rule to enter a verdict for the plaintiff. (1)

The plaintiff was a cotton spinner, who employed a broker named Armitage to sell cotton yarn for him on a del credere commission. Armitage sold to the defendant 7000 lbs. of the plaintiff's cotton, and the first delivery of 1814 lbs. was paid for on delivery. Armitage,

(1) See the report of the case in the court below, Law Rep. 1 C. P. 186.

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being in want of money, applied to the defendant for a loan of 1000*l.* The defendant refused to lend him the sum, but agreed to purchase some yarn then in Armitage's possession made by another manufacturer, Kershaw, and the defendant the same day paid Armitage 1000*l.* Kershaw's yarn proved to be worth only 725*l.* 13*s.* Subsequent deliveries of the plaintiff's goods to the value of 521*l.* 14*s.* 6*d.* were made, and the defendant then settled with Armitage, paying him in cash the excess due to him after allowing for the 1000*l.*

Armitage did not pay over the money to the plaintiff, and became bankrupt, and the action was brought to recover so much of the sum of 521*l.* 14*s.* 6*d.* as had not been paid in cash. The question left to the jury was, whether the 1000*l.* had been paid to Armitage on his general account or expressly for Kershaw's yarns. The jury found that it had been paid on general account, and a verdict was entered for the defendant, with leave to the plaintiff to move to enter a verdict for 274*l.* 7*s.*, if the settlement between the defendant and Armitage did not amount to a payment as against the plaintiff. The Court of Common Pleas made absolute a rule to enter the verdict accordingly.

John Edwards (*Temple, Q.C.*, with him), for the defendant, contended that the settlement with Armitage amounted to payment as against the plaintiff, and that it was at any rate a question for the jury, depending upon what authority, express or implied, Armitage had from the plaintiff in respect of the mode of receiving payment.

Kemplay (*Edward James, Q.C.*, with him), for the plaintiff, contended that the advance being on general account, the excess above the value of the yarns then delivered was a debt due from Armitage to the defendant, and not in any sense a payment to the plaintiff; that it was clear from authority that a settlement come to by setting off debts of the agent was not payment as against the principal: *Bartlett* v. *Pentland* (1); *Todd* v. *Reid* (2); *Scott* v. *Irving* (3); *Sweeting* v. *Pearce* (4); that no evidence of a custom that such payment should bind the principal having been

(1) 10 B. & C. 760. (2) 4 B. & A. 210. (3) 1 B. & Ad. 605.
(4) 9 C. B. (N.S.) 534; 30 L. J. (C.P.) 109;

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given at the trial, as in *Stewart* v. *Aberdein* (1), it was too late to raise that point.

KELLY, C.B. The Court are inclined to think that this case involves a question of fact, which has not been left to the jury, and without a decision of which the judgment of the Court on either side would be unsatisfactory. On more than one occasion the view has been taken by very learned judges that there is in cases such as this a question for the jury. Thus, in *Stewart* v. *Aberdein* (1), Lord Abinger said: "It must not be considered that by this decision the Court means to overrule any case deciding that when a principal employs an agent to receive money and pay it over to him, the agent does not thereby acquire any authority to pay a demand of his own upon the debtor by a set off in account with him. But the Court is of opinion that where an insurance broker or other mercantile agent has been employed to receive money for another in the general course of his business, and when the known general course of business is for the agent to keep a running account with the principal, and to credit him with sums which he may have received by credits in accounts with the debtors, with whom he also keeps running accounts, and not merely with moneys actually received, the rule laid down in those cases cannot properly be applied, but it must be understood that where an account is bonâ fide settled according to that known usage, the original debtor is discharged, and the agent becomes the debtor according to the meaning and intention and with the authority of the principal." In *Sweeting* v. *Pearce* (2), Martin, B., having stated the facts of a case very similar to the present one, *Butterworth* v. *Colesworth*, said: "In strictness, I think the question was one of fact and not of law."

I should be extremely sorry to interfere with the general understanding of the bench and the bar, that a new trial will not be granted on the ground that a question has not been left to the jury, when the party interested in it has not asked the judge to leave it to them. But in this case the jury have found that the payment by the defendant was made to Armitage on his general account, and not with reference to Kershaw's yarns, and I think

(1) 4 M. & W. 211. (2) 9 C. B. (N.S.) 534.

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they could not have come to that conclusion if they had not known that it was a usual practice for payments to be made, as in this case, from time to time, sometimes to a smaller and sometimes to a larger amount than was actually due at the time. It is because I am inclined, and more than inclined, to believe that such was the intention of the jury, and yet sitting here I cannot legally infer that it was so, that I think the justice of the case will be best met by our ordering that there be a new trial.

CHANNELL, B., BLACKBURN, J., MELLOR, J., and PIGOTT, B., concurred.

Judgment reversed, and a new trial ordered.

Attorneys for plaintiff: *Gregory & Rowcliffes.*
Attorney for defendant: *John Bond.*

Feb. 11.

E. GAUTRET, ADMINISTRATRIX OF LEON GAUTRET DECEASED *v.* EGERTON AND OTHERS.

L. JONES, ADMINISTRATRIX OF JOHN JONES, DECEASED, *v.* EGERTON AND OTHERS.

Negligence—Permissive Use of a Close in which were Dangerous Places.

The declaration stated that the defendants were possessed of land with a canal and cuttings intersecting the same, and of bridges across the canal and cuttings communicating with and leading to certain docks of the defendants, which land and bridges were used with the consent and permission of the defendants by persons proceeding to and coming from the docks; that they wrongfully and improperly kept and maintained the land, canal, cuttings, and bridges, and suffered them to be in so improper a state and condition as to render them unsafe for persons lawfully passing along and over the said land and bridges towards the said docks; and that one G. lawfully passing over and using the bridges, through the wrongful, negligent, and improper conduct of the defendants, fell into one of the cuttings and was drowned:—

Held, that the declaration disclosed no actionable breach of duty on the part of the defendants.

THE declaration in the first of these actions stated that the defendants were possessed of a close of land, and of a certain canal and cuttings intersecting the same, and of certain bridges across the said canal and cuttings, communicating with and leading

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to certain docks of the defendants, which said land and bridges had been and were from time to time used with the consent and permission of the defendants by persons proceeding towards and coming from the said docks; that the defendants, well knowing the premises, wrongfully, negligently, and improperly kept and maintained the said land, canal, cuttings, and bridges, and suffered them to continue and be in so improper a state and condition as to render them dangerous and unsafe for persons lawfully passing along and over the said land and bridges towards the said docks, and using the same as aforesaid; and that Leon Gautret, whilst he was lawfully in and passing and walking along the said close and over the said bridge, and using the same in the manner and for the purpose aforesaid, by and through the said wrongful, negligent, and improper conduct of the defendants as aforesaid, fell into one of the said cuttings of the defendants, intersecting the said close as aforesaid, and thereby lost his life within twelve calendar months next before the suit: and the plaintiff, as administratrix, for the benefit of herself, the widow of the said Leon Gautret, and A. Gautret, &c., according to the statute in such case made and provided, claimed 2500*l.*

The defendants demurred to the declaration, on the ground that "it does not appear that there was any legal duty or obligation on the part of the defendants to take means for preventing the said land, &c., being dangerous and unsafe." Joinder.

The declaration in *Jones* v. *Egerton* was the same as the above, and there was a like demurrer.

Crompton (*Mellish, Q.C.*, with him), in support of the demurrers. To maintain these actions, the declarations ought to shew a *duty* in the defendants to keep the canal, cuttings, and bridges in a safe condition, and also that some invitation had been held out to the deceased to come there, and that the thing complained of constituted a sort of trap: *Seymour* v. *Maddox* (1); *Corby* v. *Hill*. (2) These declarations are entirely wanting in all these particulars. It is not enough to shew that the defendants were aware that the place in question was in an unsafe condition, and that

(1) 16 Q. B. 326; 19 L. J. (Q.B.) 525.

(2) 4 C. B. (N.S.) 556; 27 L. J. (C.P.) 318, 4 Jur. (N.S.) 512.

the public were in the habit of passing along it: *Hounsell* v. *Smyth.* (1)

[WILLES, J. The declaration does not even state that the deceased persons were unacquainted with the state of the place.]

Herschell, for the plaintiff Gautret. The question raised upon this declaration is, whether there is any duty on the part of the defendants towards persons using their land as the deceased here did. That may be negligence in the case of a licensee, which would not be negligence as against a mere trespasser: and, if there can be any case in which the law would imply a duty, it is sufficiently alleged here.

[WILLES, J. It may be the duty of the defendants to abstain from doing any act which may be dangerous to persons coming upon the land by their invitation or permission, as in *Indermaur* v. *Dames.* (2) So, if I employ one to carry an article which is of a peculiarly dangerous nature, without cautioning him, I may be responsible for any injury he sustains through the absence of such caution. That was the case of *Farrant* v. *Barnes.* (3) But, what duty does the law impose upon these defendants to keep their bridges in repair? If I dedicate a way to the public which is full of ruts and holes, the public must take it as it is. If I dig a pit in it, I may be liable for the consequences: but, if I do nothing, I am not.]

It was not necessary to specify the nature of the negligence which is charged: it was enough to allege generally a duty and a breach of it. Knowing the bridge to be unsafe, it was the duty of the defendants not to permit the public to use it. In *Bolch* v. *Smith* (4), the defect in the fencing of the shaft was apparent: but the judgments of Channell and Wilde, BB., seem to concede that, if there had been a concealed defect, the action would have been maintainable. That shews that there is some duty in such a case as this.

Potter, for the plaintiff Jones, submitted that the implied request on the part of the defendants to persons having occasion to go to

(1) 7 C. B. (N.S.) 731; 29 L. J. (C.P.) 203.

(2) Law Rep. 1 C.P. 274; affirmed on appeal, ante, p. 311.

(3) 11 C. B. (N.S.) 553; 31 L. J. (C.P.) 137.

(4) 7 H. & N. 736; 31 L. J. (Ex.) 201.

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the docks to pass by the way in question, raised a duty in them to keep it in a safe condition.

Crompton was not called upon to reply.

WILLES, J. I am of opinion that our judgment must be for the defendants in each of these cases. The argument urged on behalf of the plaintiffs, when analyzed, amounts to this, that we ought to construe the general words of the declaration as describing whatever sort of negligence the plaintiffs can prove at the trial. The authorities, however, and reason and good sense, are the other way. The plaintiff must, in his declaration, give the defendant notice of what his complaint is. He must recover secundum allegata et probata. What is it that a declaration of this sort should state in order to fulfil those conditions? It ought to state the facts upon which the supposed duty is founded, and the duty to the plaintiff with the breach of which the defendant is charged. It is not enough to shew that the defendant has been guilty of negligence, without shewing in what respect he was negligent, and how he became bound to use care to prevent injury to others. All that these declarations allege is, that the defendants were possessed of land, and of a canal and cuttings intersecting the same, and of certain bridges across the canal and cuttings communicating with and leading to certain docks of theirs; that they allowed persons going to and from the docks, whether upon the business or for the profit of the defendants or not, to pass over the land; and that the deceased persons, in pursuance of and using that permission, fell into one of the cuttings, and so met their deaths. The consequences of these accidents are sought to be visited upon these defendants, because they have allowed persons to go over their land, not alleging it to have been upon the business or for the benefit of the defendants, or as the servants or agents of the defendants; nor alleging that the defendants have been guilty of any wrongful act, such as digging a trench on the land, or misrepresenting its condition, or anything equivalent to laying a trap for the unwary passengers; but simply because they permitted these persons to use a way with the condition of which, for anything that appears, those who suffered the injury were perfectly well acquainted. That is the whole sum and substance of these declarations. If the docks to which the way in

question led were public docks, the way would be a public way, and the township or parish would be bound to repair it, and no such liability as this could be cast upon the defendants merely by reason of the soil of the way being theirs. That is so not only in reason but also upon authority. It was so held in *Robbins* v. *Jones* (1), where, a way having been for a number of years dedicated to the public, we held that the owner of the adjoining house was not responsible for death resulting to a person from the giving way of the pavement, partly in consequence of its being overweighted by a number of persons crowding upon it, and partly from its having been weakened by user. Assuming that these were private docks, the private property of the defendants, and that they permitted persons going to or coming from the docks, whether for their own benefit or that of the defendants, to use the way, the dedication of a permission to use the way must be taken to be in the character of a gift. The principle of law as to gifts is, that the giver is not responsible for damage resulting from the insecurity of the thing, unless he knew its evil character at the time, and omitted to caution the donee. There must be something like fraud on the part of the giver before he can be made answerable. It is quite consistent with the declarations in these cases that this land was in the same state at the time of the accident that it was in at the time the permission to use it was originally given. To create a cause of action, something like fraud must be shewn. No action will lie against a spiteful man who, seeing another running into a position of danger, merely omits to warn him. To bring the case within the category of actionable negligence, some wrongful act must be shewn, or a breach of some positive duty: otherwise, a man who allows strangers to roam over his property would be held to be answerable for not protecting them against any danger which they might encounter whilst using the licence. Every man is bound not wilfully to deceive others, or do any act which may place them in danger. It may be, as in *Corby* v. *Hill* (2), that he is responsible if he puts an obstruction on the way which is likely to cause injury to those who by his permission use the way: but I cannot conceive that he could incur any responsibility merely by

(1) 15 C. B. (N.S.) 221; 33 L. J. (C.P.) 1. 10 Jur. (N.S.) 239.
(2) 4 C. B. (N.S.) 556; 27 L. J. (C.P.) 318. 4 Jur. (N.S.) 572

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reason of his allowing the way to be out of repair. For these reasons, I think these declarations disclose no cause of action against the defendants, and that the latter are therefore entitled to judgment.

KEATING, J. I am of the same opinion. It is not denied that a declaration of this sort must shew a duty and a breach of that duty. But it is said that these declarations are so framed that it would be necessary for the plaintiffs at the trial to prove a duty. I am, however, utterly unable to discover any duty which the defendants have contracted towards the persons whom the plaintiffs represent, or what particular breach of duty is charged. It is said that the condition of the land and bridges was such as to constitute them a kind of trap. I cannot accede to that. The persons who used the way took it with all its imperfections.

Herschell asked and obtained leave to amend within ten days, on payment of costs; otherwise judgment for the defendants.

Judgment accordingly.

Attorneys for plaintiffs: *N., C., & C. Milne.*
Attorney for defendants: *W. Pitman.*

Feb. 12.

STRANKS *v.* ST. JOHN.

Landlord and Tenant—Agreement for a Lease—Covenant for Title.

By agreeing to let, a lessor impliedly promises that he has a good title to let.

9 Q B 250

DECLARATION. That, on the 3rd day of June, 1862, the defendant and the plaintiff agreed, by an agreement in writing, in the following terms:—

"The Reverend George William St. John (meaning the defendant) agrees to let, and Mr. Henry Stranks (meaning the plaintiff) agrees to take, the farm at Arncott, in the county of Oxon, containing about seventy-nine acres and seventeen perches, for the term of seven years, commencing the 29th day of September, 1862; Mr. Henry Stranks having, on condition of the said agreement being granted, promised to drain the said farm within the term herein

specified, and also to keep the premises in good and habitable repair; the rent to be received quarterly by the Reverend G. W. St. John;" that all conditions were fulfilled, &c. Breach (amongst others), that the defendant never had any right or title to let the said farm to the plaintiff for the said term.

Demurrer to the breach, and joinder.

Herschell, for the defendant. The agreement alleged in the declaration is really a lease for seven years, and is therefore absolutely void: *Stratton* v. *Pettit*. (1) That case was indeed doubted by Byles, J., in *Tidey* v. *Mollett* (2); but the other judges do not refer to it.

[WILLES, J. They treated it as overruled by other decisions, and did not refer to it for that reason.]

The case of *Bond* v. *Rosling* (3) is distinguishable, for that was an action for not accepting a lease, and it was held that such an agreement might be binding as an agreement to grant and accept a lease, though void for other purposes. The judges, in *Rollason* v. *Leon* (4), expressly distinguished the case of *Stratton* v. *Pettit* (1), though Bramwell, B., expressed strong disapprobation of it. It has therefore never been overruled, and is an authority in the defendant's favour. But even if the agreement be not void, it does not contain by implication any agreement that the lessor's title is good. A parol lease implies no agreement for title, and an agreement to grant a lease cannot imply a more stringent term than a lease itself.

[WILLES, J. It was decided, in *Shepherd* v. *Keatley* (5), that, on a sale of leaseholds, the vendor must shew that the lessor had a good title.]

That is true of a sale, but there is a distinction between a sale and an agreement to grant a lease. The lessor can in all cases grant a lease, good as between the parties themselves, but the vendor can sell nothing if the lessor's title is bad. In *Gwillim* v. *Stone* (6) it was expressly decided that an agreement for a lease

(1) 16 C. B. 420; 24 L. J. (C.P.) 182.
(2) 16 C. B. (N.S.) 298; 33 L. J. (C.P.) 235.
(3) 1 B. & S. 371; 30 L. J. (Q.B.) 227.
(4) 7 H. & N. 73; 31 L. J. (Ex.) 96.
(5) 1 C. M. & R. 117; 3 L. J. (Ex.) 288.
(6) 3 Taunt. 433.

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contains no warranty of title, but only gives a right to enforce the execution of a lease containing all proper covenants. The declaration does not shew any damage to have resulted from the alleged want of title, and if the plaintiff has received all he required, he cannot recover damages for a want of title in the lessor which has not affected him.

Gray, Q.C. (*Griffits* with him), for the plaintiff. At one time it was considered doubtful whether an assignment of leaseholds implied a stipulation that the lessor had a good title. That was set at rest by *Souter* v. *Drake*. (1) There can be no difference between the agreeing to grant a lease, or to assign one; and the Court seem to have so held, for the case of *Gwillim* v. *Stone* (2) was quoted, and they said that that was decided before the subject had been much discussed. In *De Medina* v. *Norman* (3) the Court assumed that the lessor was bound to shew that he had a title to grant a lease at the time when it was to be granted. In *Roper* v. *Coombes* (4) the Court held that the lessee had a right to rescind the agreement if the lessor had no title to grant the lease; the action in that case being brought to recover the deposit money paid at the time of the making of an agreement to grant a lease. The reason that, in the case of an actual demise, no such covenant is implied, is that the lessee is then estopped from denying his landlord's title, and the covenant for quiet enjoyment applies, which renders it unnecessary. If there were no implied stipulation that the lessor had a good title, it would be no ground for refusing to accept a lease that the lessor had no title to grant it.

Herschell, in reply.

WILLES, J. I am of opinion that our judgment should be for the plaintiff. The point is one of considerable importance, and if the decision of it were not involved in the authorities that have been cited, we should have taken time to consider our judgment. I think, however, that it is involved in them, and that those authorities are in accordance with reason and good sense. The facts are these:— the defendant agreed, by an instrument not under seal, to let to

(1) 5 B. & Ad. 992; 3 L. J. (Q.B.) 31.
(2) 3 Taunt. 433.
(3) 9 M. & W. 820; 11 L. J. (Ex.) 320.
(4) 6 B. & C. 534.

the plaintiff certain lands for a term of seven years, though, at the time he had no title to let them. Such an agreement though void as a lease, since 8 & 9 Vict. c. 106, is valid as an agreement to grant a lease, and this, therefore, raises the question whether such an agreement is merely an agreement to sign a piece of parchment, or whether it binds the lessor to grant a really valid lease. If it is expressly agreed that the lessor shall grant a *good and valid* lease, as in *Robinson* v. *Harman* (1), there can be no doubt in the matter, and the only question in that case was with respect to the amount of damages; but, in any case, I think it must be implied that the lease shall be a valid one. This would be clear apart from authority, because a lease for seven years is really only a sale of land for that period, and all sales of land imply a stipulation that the vendor has a good title. There is no authority to the contrary except a dictum of Lawrence, J. The first case on the subject is *Gwillim* v. *Stone* (2), which would seem, from the marginal note, to be an authority against any such implied stipulation; but the case does not really decide that; because the agreement was to grant a lease containing the usual covenants, and Lord Mansfield's judgment rests on the ground that the plaintiff was calling for more than the usual covenants. He says, "The plaintiff could have more directly raised, the question whether he was entitled to a lease containing an absolute warranty, if he had averred that he applied to the defendant for a lease, and that the other refused it; for a lease must necessarily mean a valid lease, and if the defendant had granted him an invalid lease, or had refused to grant any, it would have been a breach." It is clear, therefore, that Lord Mansfield only intended to decide that the plaintiff was not entitled to recover a large sum which he had expended before he obtained the lease, and not to decide that the lessor was not bound to grant a valid lease. Lawrence, J., it is true, says that he had always understood that in purchases of land the rule caveat emptor applied, but I cannot think that this is correctly reported, for it was already settled law that, on a sale of land, a covenant for a good title was implied. Following that case I may refer to *Temple* v. *Brown* (3), where the Court said that

(1) 1 Ex. 850; 18 L. J. (Ex.) 202.
(2) 3 Taunt. 433.
(3) 6 Taunt. 60.

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the question was a very momentous one, and advised a settlement. The Court, therefore, certainly did not think it was decided by *Gwillim* v. *Stone*. (1) Lord St. Leonards, in his work on Vendors and Purchasers (10th ed. vol. ii. p. 141), puts agreements for granting leases, and for the sale of leaseholds, in the same category, and says that a lessee is entitled to call upon the lessor for an inspection of his title: citing *Keech* v. *Hall* (2) and *Purvis* v. *Rayer*. (3) It is clear, therefore, that the cases in Taunton cannot be considered to have decided the question. Taking Lord St. Leonards' work as a convenient compendium of the cases, we find next *Roper* v. *Coombes* (4), with respect to which he seems to take the view of Mr. Gray that "lease" must mean "a valid lease." Speaking of *Fildes* v. *Hooker* (5), he says, "the Master of the Rolls decided that the intended lessor *who was plaintiff*, could not enforce a specific performance without producing the original lessor's title. But it still remains undecided whether a lessee can as plaintiff call for the original lessor's title." It seems unnecessary to go farther into the authorities; it is a question of great importance, but one which appears to be already settled. A person who agrees to let land agrees to grant a *valid* lease, as a person who agrees to sell land agrees to execute a *valid* conveyance of it.

KEATING, J. I am of the same opinion. Mr. Herschell tried to distinguish between an agreement to grant a lease and an agreement to sell a lease, but I think the case of *Roper* v. *Coombes* (4) puts an end to such a distinction, if it ever existed, for there the agreement was to grant a lease, and Lord Tenterden asked if it was not the same as the sale of a lease, and treated it as if it was.

Judgment for the plaintiff.

Attorney for plaintiff: *W. V. Eyre.*

Attorneys for defendants: *Thomas White & Sons, for R. B. B. Hawkins, Woodstock.*

(1) 3 Taunt. 433.
(2) 1 Dougl. 21.
(3) 9 Price, 483.
(4) 6 B. & C. 534.
(5) 2 Mer. 424.

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Feb. 12.

County Court—Costs—Jurisdiction of Superior Court, under 13 & 14 Vict. c. 61, s. 14.

A county court judge gave judgment on an interpleader issue for the execution creditor, with costs. The Court upon appeal reversed that judgment, and ordered a new trial; holding, that the *whole* judgment, including that part of it which related to the costs, was thereby reversed.

APPEAL, from the county court of Suffolk holden at Hadleigh, in an interpleader issue.

The defendant having issued execution against the goods of one C. G., the plaintiff, who was the landlord of the premises, gave to the bailiff of the county court in possession a notice in the manner prescribed by 19 & 20 Vict. c. 108, s. 75, that he claimed 111*l.* for rent. The bailiff then made a further distress, and took under it a haystack.

An interpleader summons having issued, in the particulars of claim the plaintiff claimed the rent in three different sums, due for different parts of the land.

At the trial it was suggested by the defendant that the plaintiff was relying on a previous distress, which the plaintiff alleged he had made of the same goods, and the judge then asked the plaintiff what he meant by his notice given to the bailiff, and the plaintiff replied that he had never intended to employ the bailiff or any of the officers of the court to levy for him. The judge held that this was a repudiation of the act of the bailiff, and deprived the plaintiff of his rights under 19 & 20 Vict. c. 108, s. 75, and no previous distress having been proved, he held the levy to be good, and adjudged the goods to have been the property of the execution debtor; and he ordered that the amount on the warrant for debt and costs should be paid out of court to the defendant, and that the plaintiff should pay the costs of the issue. From this decision the plaintiff appealed. (1)

(1) Under 19 & 20 Vict. c. 108, s. 68, which extends the right of appeal given by 13 & 14 Vict. c. 61, s. 14, to interpleader issues.

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Dowdeswell, Q.C., for the plaintiff, contended that, according to the decisions of *Beard* v. *Knight* (1) and *Foulger* v. *Taylor* (2), the bailiff of the county court was not the agent of the landlord: and that at any rate the mistake of the plaintiff could not render his notice invalid, or deprive him of his rights under the statute.

Murray, for the defendant, contended that there must be at all events a new trial, as the land appeared to be held upon several lettings, and the case did not find whether the goods seized by the bailiff were on all or only one of the parts so let, or what amount of rent was due in respect of the different portions of the land.

Dowdeswell, Q.C., in reply.

WILLES, J. [After stating the facts of the case]: The county court judge should not have asked the question; it was for him to interpret the written notice, which contained no ambiguous phrase, and could not therefore be explained by parol evidence. Even, however, if the plaintiff's answer were to be read as part of the notice, it would only amount to his interpretation of the act of parliament, which, if it were erroneous, could not prevent his being entitled to the benefit of the act, but which Mr. Dowdeswell has shewn is in fact supported by authority. Unfortunately the case is not in such a form that we can give a final judgment between the parties. It does not appear whether the land is held on one or three rents, and if the latter, whether the goods seized by the bailiff were all on the same part of the land or not; we must therefore order a new trial. If it should turn out that there were upon each holding goods sufficient to satisfy the rent of it, the plaintiff must be paid the whole rent for one year out of the levy; he will at any rate be entitled to satisfy the rent of each tenement for one year to the extent of the goods which were on it at the time of the levy.

The question then arises, whether, on reversing the judgment and ordering a new trial, under 13 & 14 Vict. c. 61, s. 14, we

(1) 8 E. & B. 865; 27 L. J. (Q.B.) 359, 4 Jur. N.S. 782
(2) 5 H. & N. 202; 29 L. J. (Ex.) 154.

set aside the order of the Court below with respect to costs. (1) Different opinions have been expressed by the Courts of Exchequer and Queen's Bench respecting the power of the superior courts over the costs of the Court below under an analogous section—19 & 20 Vict. c. 108, s. 43 (2)—the former, in *Whitehead* v. *Procter* (3), holding that the superior court had power over them, the latter, in *Churchward* v. *Coleman* (4), that it had not. We think, in the case of an appeal at least, the costs of the Court below must have been intended to be dealt with as accessory to the judgment appealed from, and that the judgment being reversed, the order for payment of costs falls also.

KEATING and MONTAGUE SMITH, JJ., concurred.

Judgment of the Court below reversed, with costs of appeal, and a new trial ordered.

Attorneys for plaintiff: *Miller & Miller, for G. Mumford, Sudbury.*

Attorneys for defendant: *Cree & Last, for Robinson, Safford, & Grimwade, Hadleigh.*

(1) 13 & 14 Vict. c. 61, s. 14, enacts that "The Court of Appeal may either order a new trial on such terms as it thinks fit; or may order judgment to be entered for either party, as the case may be; and may make such order with respect to the costs of the appeal as such Court may think proper."

(2) 19 & 20 Vict. c. 108, s. 43, which for a mandamus to a judge of a county court substitutes a rule of one of the superior courts, enacts that the Court may direct the act to be done, and "may make such order with respect to costs, as to such Court shall seem fit." In each of the cases cited, the application was for a rule directing the county court judge to hear an interpleader issue, he having refused to hear it on the ground of insufficiency of particulars, and having ordered the claimant to pay costs.

(3) 3 H. & N. 532.

(4) Law Rep. 2 Q. B. 18.

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Feb. 6.

THORBURN *v.* BARNES.

Mercantile Contract, Construction of—Arbitration: Misconduct of Arbitrator, how taken Advantage of.

5 Eq 448

A., on the 7th of April, 1866, contracted to buy of B. 250 bales of cotton, "to arrive in Liverpool per ship or ships from Bombay," on the terms of the printed rules of the Cotton Brokers' Association of Liverpool, as indorsed on the contract, at a certain price per lb. "for fair new merchants' Oomrawattee, *March or April shipment.*" By one of the rules referred to, it was provided that, upon such a contract, the name of the ship must be given to the buying broker "*within two calendar months next after the date of shipment named in the contract;*" and by other rules it was provided that, "in case of any dispute arising out of a contract," the matter was to be referred to two members of the association; and that, in the event of one of the parties neglecting for three days after notice to appoint an arbitrator, the chairman of the association was to name two, whose award was to be final, &c.

On the 21st of June, the seller's broker gave the buyer's broker the name of a ship on board of which were 225 bales of the cotton, *which was shipped at Bombay on the 19th of March.* A. declined to accept the cotton, on the ground that the name of the ship had not been given within two calendar months next after the date of shipment:—

Quære, whether the period of two months for the declaration of the ship was to reckon from the last day of the actual shipment of the cotton, or from the end of the ~~two months limits mentioned in~~ time for shipment limited by the contract?

A dispute having arisen as to the meaning of the contract, A. appointed one J. as arbitrator on his part. B. neglecting to appoint his arbitrator, the chairman of the association appointed two, viz. J. and one D.; but B. objecting to J., inasmuch as he had been the person originally named by A., the chairman withdrew his name, and appointed one H. in lieu of him; and the two arbitrators so appointed, having been furnished by A.'s broker with a copy of the contract and of the correspondence, without giving B. an opportunity of being heard, and within two hours of his receipt of notice that they had been appointed, made an award holding that the declaration made on the 21st of June was not a proper one, and consequently that the buyer had power to cancel the contract:—

Semble, that the omission to give B. (the seller) an opportunity of being heard before them was misconduct on the part of the arbitrators, and good ground of objection to the award if taken in the proper manner, viz. by motion to set it aside or refer it back; but,

Held, that it could not be set up by way of plea to an action upon the award, or by way of replication to a plea relying upon the award.

THE first count of the declaration stated that it was agreed by and between the plaintiff and the defendant that the plaintiff should sell to the defendant, and the defendant should buy of the plaintiff, certain cotton to arrive in Liverpool per ship or ships

from Bombay, on the terms of the printed rules of the Cotton Brokers' Association of Liverpool, as indorsed on the said agreement, to wit, 250 bales of cotton, on the basis of 14¼*d.* per lb., fair new merchants' Oomrawattee, March or April shipment; no allowance to seller; in case of inferiority of quality, the cotton to be taken by the buyer at an allowance to be settled by arbitration in the usual manner; to be taken from the warehouse: Averment, that, although before action he did, and was always ready and willing to do, all things, and all conditions precedent were performed and fulfilled, and all times elapsed necessary to entitle, and nothing happened or was done to disentitle the plaintiff to have the said agreement performed by the defendant, and to maintain this action for the respective breaches thereinafter mentioned; yet the defendant broke the said agreement in this, that he did not nor would accept or receive the said cotton, or any part thereof, pursuant to the said agreement, nor pay for the same according to the terms of the said agreement or otherwise, but therein wholly made default, contrary to and in violation of the said agreement, in this, that, before any breach thereof by the plaintiff, the defendant wholly and absolutely refused to accept or receive the said cotton, or any part thereof, and gave notice to the plaintiff that he would not accept or take the same, and that he wholly repudiated the said agreement, and he then discharged the plaintiff from any further performance of the said agreement by the plaintiff, and then and thereby broke and violated the said agreement; and that, by reason of the premises, the plaintiff lost profit, &c. &c.

The declaration also contained the common money counts.

The defendant pleaded to the first count,—first, that it was not agreed as alleged,—secondly, that the plaintiff was not ready and willing to deliver cotton according to the said contract, as alleged, —thirdly, that, by the terms of the said printed rules of the Cotton Brokers' Association of Liverpool, as indorsed on the said agreement, it was amongst other things provided in the words and figures following, that is to say, 2. "In all cases when the terms are by ship or ships, or for shipment before a specified date, the name of the ship or ships, if from an East Indian, Chinese, or Japanese port, must be given to the buying broker within two calendar months, or a month longer in the event of the non-arrival

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of the expected mail, from Mediterranean and European ports within four weeks, and from the North and South American ports within six weeks, next after the date of shipment named in the contract: In cases where cotton is *tendered* on the last day of a month, the seller shall be in possession of a warehouse delivery order, to enable the buyer at once to take delivery of the cotton: In default, the buyer shall have the option either of declaring the contract cancelled so far as regards any undeclared number of bales, or of claiming from the seller the difference in the market-price of the cotton undeclared, or of purchasing similar cotton against the seller, who shall forthwith make good to the buyer the loss (if any) on such re-purchase." 4. "Where cotton shall arrive by more than one vessel, each shipment shall be considered as constituting a separate contract, and there shall be a separate invoice for each shipment, and a separate arbitration, if required." 7. "In case of any dispute arising out of a contract, the matter to be referred to two members of the Cotton Brokers' Association for settlement, such referees having power to call in a third member, in case they shall deem it necessary. All applications for arbitration on cotton bought to arrive shall be made within ten days of notice being received that the cotton is ready for delivery." 8. "In the event, however, of one of the disputing parties appointing an arbitrator, and the other refusing or neglecting to do so for three days after notice in writing of the appointment, or in case the arbitrators appointed shall not within seven days after their appointment agree to an award or appoint a third arbitrator, or, after the appointment of such third arbitrator, in case of the death, refusal to act, or incapacity of any of such three arbitrators, then, upon application of either of the disputing parties, the question in dispute shall stand referred to two arbitrators to be nominated by the chairman of the association for the time being, or, in case of his absence, illness, or interest in the matter in dispute, then by the deputy-chairman, if not interested, and, in case of the absence of the chairman and deputy-chairman, their illness, or interest in the matter in dispute, then by the committee; and, in case the two arbitrators so appointed, whether by the chairman, the deputy-chairman, or the committee, shall not within seven days after their appointment agree to an award or choose a third arbitrator, then

the committee shall appoint a third arbitrator, and shall in the case of the death, refusal to act, or incapacity of any of such three arbitrators from time to time substitute a new arbitrator in the place of the arbitrator or arbitrators so dying, refusing, or incapacitated. The arbitrators in all cases to be members of the association." 9. "No member of the committee having any interest in the matter in dispute shall vote on the question of the appointment of arbitrators; and no arbitrator having such interest shall be competent to sit on any arbitration. The award of any two arbitrators in writing, signed by them (subject only to the right of appeal after mentioned), shall be conclusive and binding upon all disputing parties, both with respect to the matters in dispute and all expenses of the reference and award." 10. "In case either party shall be dissatisfied with the award, a right of appeal shall lie to the committee of the association, provided it be claimed before twelve o'clock on the day next after the day on which the objecting party shall have notice of the award, and provided also the appellant do pay to the association the sum of 10*l.* as a fee for the investigation; and an award signed by the chairman, or, in his absence, by the deputy-chairman, and countersigned by the secretary, shall be deemed to be the award of the committee, and shall in all cases be final. For the purpose of enforcing any award by attachment or otherwise, these rules and any contract referring thereto, and the memorandum of the appointment of the arbitrators, may be made a rule of any court of record." Averment that, after the making of the said contract or agreement, the plaintiff gave to the defendant's buying broker the name of the ship *Ann Milicent* from Bombay aforesaid, the same being an East Indian port, as the ship by and on board of which 225 of the 250 bales in the contract mentioned were coming, and declared the said 225 bales as against and in part performance of the said contract or agreement; that the said 225 bales of cotton so declared as aforesaid were shipped in the month of March, and were a March shipment; and that the plaintiff did not give the name of the said ship to the defendant's buying broker within two calendar months next after the month of March or the shipment of the said bales, although the expected mail did arrive, wherefore the defendant refused to accept or receive the said 225 bales, and gave notice

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to the plaintiff that he would not accept or take the same; and that, so far as related to the first count of the declaration, the plaintiff was suing in respect of such refusal by the defendant to accept or take the said 225 bales, and not otherwise.

Fourth plea to the first count, that, in and by the said terms of the Cotton Brokers' Association, it was provided as in the third plea mentioned; and that, after the making of the contract, the plaintiff gave to the defendant's buying broker the name of the ship *Ann Milicent* from Bombay aforesaid, the same being an East Indian port, as the ship by and on board of which 225 of the 250 bales in the contract mentioned were coming, and declared the said 225 bales as against and in part performance of the said contract or agreement; that the said 225 bales of cotton so declared as aforesaid were shipped in the month of March, and were a March shipment, and that the plaintiff did not give the name of the said ship to the defendant's buying broker within two calendar months next after the month of March or the shipment of the said bales, although the expected mail did arrive; that he, the defendant, contended and alleged that the said declaration was not a proper one, and by reason thereof he claimed to refuse to accept or receive the said bales, and to cancel the said contract so far as regarded the said 225 bales, and gave notice thereof to the plaintiff; that, a dispute thereupon having arisen between the plaintiff and the defendant out of the said contract, he the defendant, in pursuance of the said terms indorsed on the contract, appointed an arbitrator, and gave notice to the plaintiff in writing of the said appointment, and, the plaintiff neglecting to appoint another arbitrator for three days after the said notice, then, upon application of the defendant, the question in dispute stood referred to two arbitrators who were duly nominated by the chairman of the said association for the time being, according to the said terms; that the said arbitrators, having taken upon themselves the said arbitration, afterwards duly, and according to the said terms, made and published their award in writing signed by them respecting the matters in dispute so referred to them, whereby they awarded and adjudged that the declaration of the said 225 bales so made by the plaintiff as aforesaid was not a proper one, and that the defendant was entitled to cancel the said contract so far as regarded the said 225 bales,

which award remained and was unappealed against and in full force; and that, so far as related to the first count of the declaration, the plaintiff was suing in respect of the refusal by the defendant to accept or take the said 225 bales, and not otherwise.

Fifth plea, to the residue of the declaration, never indebted.

The plaintiff joined issue on all the pleas, and demurred to the third plea, on the ground that, "according to the contract, the ship need only be declared within two months from April." Joinder.

Second replication to the third plea, that the agreement sued on in the first count of the declaration was made subject and was subject to a certain well-known usage and custom of the cotton trade at Liverpool, where the agreement was made, according to which custom and usage the plaintiff was under the circumstances in the plea mentioned bound by the said agreement to give the name of the ship to the defendant's buying broker only within two calendar months next after the month of April in the agreement mentioned, and not before.

Second replication to the fourth plea, that the award in the fourth plea mentioned was not an award duly and according to the said terms in the said rules contained made and published, and was not an award within the true intent and meaning of the said agreement and rules, by reason of the said arbitrators not having been duly nominated and appointed according to and within the true intent and meaning of the said rules.

Third replication to the fourth plea, that the award in the fourth plea mentioned was not an award duly and according to the said terms in the said rules contained made and published, and was not an award within the true intent and meaning of the agreement, by reason of the award having been made before the arbitrators were nominated according to and within the true intent and meaning of the said rules, and before they had taken upon themselves the said arbitration according to the true intent and meaning of the said rules.

Fourth replication to the fourth plea, by way of equitable defence, repeating the facts stated in the last preceding replication, and averring them to be true,—that, in consideration of the premises, and of the plaintiff agreeing with the defendant not to move

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to set aside the award, but to bring the dispute in the fourth plea mentioned before the members of the Liverpool Cotton Brokers' Association, the defendant agreed with the plaintiff to throw up and abandon the award, and to renounce all benefit under the same; that he the plaintiff did abstain, according to the said agreement, from moving to have the award set aside as aforesaid; that the time within which he could move to set aside the said award has now passed; that the said dispute was brought according to the said agreement before the members of the said association; and that the defendant is contrary to the said agreement now pleading the said award, and thereby trying to derive benefit from the same, contrary to and in violation of the said agreement.

The defendant also demurred to the second replication to the third plea, on the ground that "the alleged custom is inconsistent with the agreement;" to the second replication to the fourth plea, on the ground that, "notwithstanding the matter alleged in the replication, the award is binding unless set aside;" to the third replication to the fourth plea, on the like ground; and to the fourth replication to the fourth plea, on the ground that "it shews no equity to be relieved as respects the award, if the award is good, and there is no need nor any equity for relief if the award is bad." Joinders.

The cause was tried before Blackburn, J., at the last winter assize at Liverpool. The plaintiff is a cotton-broker at Liverpool, and a member of the Cotton Brokers' Association of Liverpool, and carries on business under the firm of Thomas Thorburn & Co. The defendant is a cotton-spinner at Bolton. *On the 7th of April*, 1866, the defendant, through one Bulley, his broker, contracted to buy of the plaintiff 250 bales of Surat cotton "to arrive." The sold-note was as follows:—

"I have this day sold to you, to arrive in Liverpool per ship or ships from Bombay, on the terms of the printed rules of the Cotton Brokers' Association of Liverpool, as indorsed, two hundred and fifty bales cotton, on the basis of 14¼*d.* per lb. for fair new merchants' Oomrawattee, *March or April shipment.* No allowance to sellers. In case of inferiority of quality, the cotton to be taken by the buyer at an allowance to be settled by arbitration, in the usual manner. To be taken from the warehouse."

The rules of the Cotton Brokers' Association of Liverpool, which were printed at the back of the bought and sold-notes, are set out in the third plea, so far as they are material. Being pressed by the buyer's broker to name the ship or ships, the plaintiff *on the 21st of June* sent Bulley the following memorandum :—

"We beg to give you notice that, of the 250 bales cotton sold you, 'to arrive,' 7th of April, 225 bales are coming by the *Ann Milicent;* and we shall give you the ship's name for the other 25 bales in a day or two."

The receipt of this notice was on the following day acknowledged by Bulley; but, finding subsequently that the *Ann Milicent* had sailed from Bombay *on the 27th of March*, Bulley on the 10th of July wrote the plaintiff as follows :—

"I find that the *Ann Milicent*, by which you declare 225 Oomrawattees, cleared in the month of March, whilst your declaration is dated 21st June. I cannot, therefore, on the part of Mr. Barnes, accept the declaration."

As to the other twenty-five bales, there was no dispute. They were received and paid for.

The *Ann Milicent* arrived at Liverpool on the 31st of July, 1866, and notice of her arrival was immediately given to Bulley, with an intimation from the plaintiff that he should insist upon the fulfilment of the contract. On the 1st of August, Bulley, on behalf of the defendant, intimated his desire to have the question in dispute referred to arbitration, as provided by the 7th rule of the Cotton Brokers' Association, and required the plaintiff to appoint some member of the association to meet Mr. Charlton Jones, who would act for the defendant. On the 11th of August, the defendant received notice that the cotton was ready for delivery. On the 15th Bulley sent the plaintiff a notice, that, if he failed to appoint an arbitrator on or before the 17th, he (Bulley) would call upon the chairman of the association to appoint arbitrators to whom the matter should be referred, in conformity with the 8th clause of the printed rules. The plaintiff having failed to appoint an arbitrator on his behalf, Mr. Buchanan, the president of the Cotton Brokers' Association, appointed Mr. Charlton Jones and a Mr. Durning to act as arbitrators; and notice of the appointment was given to the

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plaintiff and to Bulley. The plaintiff, having met Mr. Buchanan in Liverpool, objected to the appointment of Mr. Charlton Jones, inasmuch as he was the arbitrator named by Bulley. Mr. Buchanan thereupon, on the 31st of August, wrote to each party as follows :—

"Referring to my note of the 21st instant, and Mr. Thorburn having raised objections to my nomination of Mr. Charlton Jones, he at once withdrew; and I have nominated Mr. E. Habershon in his stead, to act in conjunction with Mr. Durning, with whom please to communicate."

On the same day, and within two hours after the receipt by the plaintiff of this notice, and without his having any intimation from the arbitrators that they were prepared to act, he received from them the following award :—

"Arbitration on contract for 225 (part of 250) bales Surat cotton bought by Mr. T. Barnes from Messrs. T. Thorburn & Co., on the 7th of April, 1866.

"We, the undersigned, cotton-brokers, having considered all the circumstances connected with the above case, do hereby decide that the declaration made on the 21st of June is not a proper one, and consequently the buyer has the power to cancel the contract.

(Signed) "W. Durning.
"E. Habershon.

"Liverpool, 31st August, 1866."

Some doubts having been entertained by members of the Cotton Brokers' Association as to the propriety of the decision of the arbitrators, a meeting was called on the 14th of September, and it was resolved by a majority of the members present that the award should be set aside.

It was admitted that Bulley, the defendant's broker, had fairly laid all the letters and documents before the two arbitrators, without attending before them or arguing personally. On the 26th of October, Bulley received notice from the plaintiff that the cotton had been sold, with an account sales and account current shewing a loss of 1022*l.* 16*s.* 8*d.*, payment of which sum was demanded.

It was also admitted that the shipment was on the 19th of March, 1866.

On the part of the plaintiff it was contended that the declara-

tion made on the 21st of June was in time; that the dispute between the parties, being, not as to the mode of performing the contract, but as to its construction, was not a dispute arising out of the contract within the meaning of the rules of the Cotton Brokers' Association; and that the award was improperly made, without notice to the plaintiff, or an opportunity given to him to be heard, and was therefore void.

For the defendant it was insisted that the declaration of the ship should have been made within two months from the day of shipment of the cotton, viz. the 19th of March; that the dispute as to the time of declaring the ship was the proper subject of a reference, and the award well made; and that there was no issue whereon to raise the objection, if well founded.

The learned judge thought the point as to the validity of the award was not raised by the pleadings,—referring to *Veale* v. *Warner* (1); but said that, if it could be raised in any way, and the Court thought the objection sustained by the evidence, the plaintiff might have leave to amend if the Court thought fit. He thereupon directed a nonsuit to be entered, reserving leave to the plaintiff to move to enter a verdict for 1022*l.* 16*s.* 8*d.*, the Court to draw any inferences of fact from the evidence.

Brett, Q.C. (Jan. 14), obtained a rule nisi to enter a verdict for the plaintiff for 1022*l.* 16*s.* 8*d.*, on the grounds,—first, that the declaration of the ship was in sufficient time,—secondly, that the award was void, because not on a dispute within the rules, or because there was no power in the president of the Cotton Brokers' Association to change the arbitrator, or because the plaintiff had no notice of the meeting and no opportunity of being heard; and also for judgment non obstante veredicto on the fourth plea.

Quain, Q.C., and *R. G. Williams*, shewed cause. If the Court be with the defendant upon the award, the demurrers become immaterial. The contract is for a March or April shipment; and, the shipment being from an Indian port, the declaration of the name of the ship should have been made within two calendar months from the date of shipment. The question is, whether the two months are to be reckoned from March or from April; if from the former, the

(1) 1 Wms. Saund. 327 *a*, n. (3).

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declaration was too late. The shipment was on the 19th of March, and the ship sailed on the 27th. The mention of the two months was to give the seller the option of declaring either for a March or an April shipment; but it was not intended to enlarge the time for declaring.

[WILLES, J. Suppose part of the cargo was shipped in March and part in April, and the ship sailed in April?]

In that case, it might perhaps be called an April shipment. But that point does not arise here. Then it is said that the dispute which arose here was not the subject of a reference within the rules of the Cotton Brokers' Association. The seventh rule provides that, "in case of any dispute arising out of the contract," the matter shall be referred. This was a contention as to the application of the rules to the circumstances of the particular case, and therefore clearly a dispute arising out of the contract, which incorporates the rules. The objection that Habershon was substituted by the president as an arbitrator in lieu of Charlton Jones, was not taken at the trial: and, if it had been, it would have availed nothing. The plaintiff having failed to name an arbitrator, the president was empowered by the eighth rule to name one for him; and the substitution of Habershon was made by reason of the plaintiff's objection to Jones, because he had originally been named by the defendant.

[WILLES, J., referred to Co. Litt. 157. b., where it is said that, "if a juror hath been an arbitrator chosen by the plaintiff or defendant in the same cause, and have been informed of or treated of the matter, this is a principal challenge."]

If the point had been taken, Mr. Buchanan might have been put into the witness-box to shew that the substitution was made at the plaintiff's request. The next objection to the award is, that the plaintiff had no notice of the meeting of the arbitrators, and no opportunity of being heard. This, it must be remembered, was a mercantile arbitration, in which it is every day's practice to proceed without having the parties before the arbitrators at all. The facts were admitted. There was no necessity for hearing evidence.

[WILLES, J. In the case of *Re Brook, Delcomyn, and Badart* (1) this Court declined to listen to such an argument.]

(1) 16 C. B. (N.S.) 403; 33 L. J. (C.P.) 246; 10 Jur. (N.S.) 704.

That was a totally different case. The umpire, professing to act upon the statements and documents submitted to him, without communication with either party obtained other evidence; and the Court held that to be a violation of the universal principles of justice. Besides, that arose upon motion. It is extremely doubtful whether the plaintiff could have raised this objection even upon a motion to set aside the award: but it is clear, since the cases referred to in the note to *Veale* v. *Warner* (1), that it cannot be raised by plea or by a traverse of the plea. In *Whitmore* v. *Smith* (2), it was held by the Exchequer Chamber (reversing the judgment of the Court of Exchequer), that, where an award is made upon all the matters in difference, and is in the required form, and intended by the arbitrators to express their decision, an objection that they adopted the opinion of a third person by which they agreed to be bound, cannot be raised under a plea of nul tiel agard to an action on the award. (3) Willes, J., delivering the judgment of the Court of error, there says: "Whether the award was subject to be set aside for misconduct of the arbitrators, by an application to the Court of which the submission might be made a rule (12 & 13 Vict. c. 106, s. 154), depends upon the question of fact whether in acting upon Rotton's opinion they did more than the parties themselves consented to: see *Anderson* v. *Wallace* (4): and upon that question we need not pronounce any opinion; because, assuming that it ought to be answered in the affirmative, the question still remains, whether the objection can be raised by plea; and we are of opinion that it cannot." That which is suggested here is nothing if not misconduct.

[WILLES, J. Insufficiency of opportunity of being heard is clearly ground for a motion to set aside the award. The only question here is, whether the total absence of opportunity is matter for a plea.

MONTAGUE SMITH, J. The strong point upon this part of the

(1) 1 Wms. Saund. 327 *a*; referring to *Wills* v. *Maccarmick*, 2 Wils. 148; *Braddick* v. *Thompson*, 8 East, 344; *Preed* v. *Duchess of Cumberland*, 4 T. R. 585; *Foreland* v. *Marygold*, 1 Salk. 72; *Grazebrook* v. *Davis*, 5 B. & C. 534; *Johnson* v. *Durant*, 2 B. & Ad. 925; *In re Hall*, 2. M. & Gr. 847.

(2) 7 H. & N. 509, 518; 29 L. J. (Ex.) 402.

(3) And see *Gray* v. *Wilson*, Law Rep. 1 C. P. 50.

(4) 3 Cl. & F. 26.

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case, as it seems to me, is, that there was a remedy pointed out by the tenth rule, viz. an appeal to the committee of the association, which the plaintiff did not think fit to adopt.]

Brett, Q.C., and *C. Russell*, in support of the rule. The contract gives the seller the option of declaring cotton shipped in March or April. The second rule of the Cotton Brokers' Association requires this declaration to be made, in the case of cotton coming from an East Indian port, within two calendar months next after the date of shipment named in the contract, which means, as the plaintiff contends, within two months after the last day of April, that is, two months next after the time for shipment given by the contract. The arbitrators put a different construction upon the contract. But the minutes of the association, which were made part of the evidence at the trial, shewed that that conclusion was unanimously repudiated by that body.

[WILLES, J. The decision of the case cannot be affected by the opinions of the members of the Cotton Brokers' Association. We have only two questions before us,—first, whether the award is binding,—secondly, if it is not, what is the construction of the seventh rule.

MONTAGUE SMITH, J. The plaintiff did not appeal, as he might have done, under the 10th rule.]

To appeal would have been to admit the jurisdiction of the arbitrators. The matters intended to be referred under this contract were disputes arising out of the mode of performing it,—whether the cotton was of the quality contracted for, and whether it was in a merchantable condition, or according to sample; matters of fact, which might properly form the subject of a reference to merchants. But the legal effect and construction of the contract was matter of law, to be determined by the Court. Then, was this a valid award? It is of the very essence of an award that it shall be a final decision of a dispute between parties who have had an opportunity of presenting their respective cases to the arbitrator in the presence of each other. No such opportunity was given here; the notice that the award had been made, was given to the plaintiff within two hours of the receipt by him of an intimation that the arbitrators had been appointed; and the award seems to have been

founded upon a statement and documents which were handed to the arbitrators by the defendant's broker without any communication to the plaintiff.

[WILLES, J. I think we must assume that the plaintiff had not an opportunity of being heard before the arbitrators, because that point is reserved.]

This may be likened to the case of an action upon a foreign judgment. There, it is not competent to inquire into the regularity of the proceedings, or the propriety of the judgment; but it may be shewn that they are contrary to natural justice, and void. The rule is well stated, and the authorities collected, in the notes to *The Duchess of Kingston's Case*, in 2 Smith's Leading Cases, 6th ed. 693:—"It is clear that, if the judgment appear *on the face of the proceedings* to be founded on an incorrect view of the English law knowingly or perversely acted on,—see *Novelli* v. *Rossi* (1), the judgment of Cockburn, C.J., in Cam. Scacc. in *Imrie* v. *Castrique* (2), and *Simpson* v. *Fogo* (3); or of the Law of Nations,—*Pollard* v. *Bell* (4); *Bird* v. *Appleton* (5); *Baring* v. *Clagett* (6); *Bolton* v. *Gladstone* (7); or to offend common reason and justice,—*Buchanan* v. *Rucker* (8); and see *Cavan* v. *Stewart* (9); *Frankland* v. *M'Gusty* (10); *Bruce* v. *Wait* (11), where the judgment was that of an inferior English court; *Ward* v. *Ellayn* (12); or even to be grossly defective,—*Obicini* v. *Bligh* (13),—it will not be conclusive either in a declaration or a plea. It is also not too much to say that our courts would allow a judgment, whether in personam or in rem, to be impeached by extrinsic evidence shewing distinctly that the court which pronounced it had no jurisdiction: see *Havelock* v. *Rockwood* (14); *Bowles* v. *Orr* (15); or that it was obtained by fraud, for that, to use the language of the Lord Chief Justice, is an extrinsic collateral act, which vitiates the most solemn proceedings even of our own courts: or by means clearly

(1) 2 B. & Ad. 757.
(2) 8 C. B. (N.S.) at p. 415.
(3) 29 L. J. (Ch.) 657.
(4) 8 T. R. 434, 444.
(5) 8 T. R. 562.
(6) 3 B. & P. 201, 215.
(7) 2 Taunt. 85.
(8) 1 Camp. 63; 9 East, 192.
(9) 1 Stark. 525.
(10) 1 Knapp, 274.
(11) 1 M. & G. 1.
(12) Cro. Jac. 261.
(13) 8 Bing. 335.
(14) 8 T. R. 268.
(15) 1 Y. & C. 464.

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contrary to natural justice; as, for instance, without any notice, summons, or appearance of the party defendant, or any equivalent proceeding."

[WILLES, J. The merits cannot be gone into in an action upon the judgment, where the party has had an opportunity of being heard: *Ferguson* v. *Mahon* (1); *Sheehy* v. *Professional Life Assurance Company*. (2)]

It may be conceded that, if the matter complained of was a mere irregularity, the only mode of taking advantage of it would be by motion to set aside the award. (3) But an award which is made without giving the parties an opportunity of being heard, is so contrary to natural justice that it is altogether a nullity. This was laid down by this Court in the strongest possible terms in the case referred to by Willes, J., of *Re Brook, Delcomyn, & Badart*. (4) Erle, C.J., says: "It is one of the first principles in the administration of justice, that the tribunal which is to decide must hear both sides, and give both an opportunity of hearing the evidence upon which the decision is to turn." Here, there might have been important evidence of usage as to the intendment of the words used in the contract, or there might have been conduct on the part of the buyer which amounted to an acquiescence in the declaration of shipment, though too late. The parties should have had an opportunity of representing their respective views before the arbitrator, and of calling witnesses if necessary. The language of the judges in *Braddick* v. *Thompson* (5), *Grazebrook* v. *Davis* (6), and the other cases referred to in the notes to *Veale* v. *Warner* (7), is very guarded. In no case has it been held that the objection that the party has had *no opportunity whatever* of being heard is not the subject of a plea. The Court, therefore, must now determine that question upon principle; and, as power is reserved to amend in any manner which may avail the plaintiff to raise the objection, they may allow an equitable replication to be added.

(1) 11 Ad. & E. 179; 3 P. & D. 143.
(2) 2 C. B. (N.S.) 211; 26 L. J. (C.P.) 301; in error, 3 C. B. (N.S.) 597.
(3) See *Fessard* v. *Mugnier*, 18 C. B. (N.S.) 286,
(4) 16 C. B. (N.S.) 403; 33 L. J. (C.P.) 246.
(5) 8 East, 344.
(6) 5 B. & C. 534.
(7) 1 Wms. Saund. 327 *a*.

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WILLES, J. This is an action for not accepting a quantity of cotton which arrived by the ship *Ann Milicent* from Bombay, having been shipped on board her at Bombay on the 19th of March, 1866, pursuant to a contract dated the 7th of April, 1866, by which the plaintiff agreed to sell to the defendant 250 bales of cotton, to arrive in Liverpool per ship or ships from Bombay, on the terms of the printed rules of the Cotton Brokers' Association of Liverpool, as indorsed on the contract; the cotton to be of March or April shipment. By one of the rules referred to (rule 2), it is provided that, in all cases when the terms are by ship or ships, or for shipment before a specified date, the name or names of the ship or ships must be given to the buying broker within a time mentioned in the rule,—in a case like the present, within two calendar months next after the date of shipment named in the contract. The shipment of the cotton in question having taken place on the 19th of March, the name of the ship in which 225 bales were on their way, viz. the *Ann Milicent*, was declared to the defendant's broker on the 21st of June. On the part of the plaintiff it was insisted that, as the 21st of June fell within two months after the nd of April, this declaration was a compliance with the terms of he contract. The defendant, on the other hand, contended that, as the 21st of June did not fall within two months next after the 19th of March, the declaration was not within the terms of the contract, and consequently that he was not bound to accept the cotton. The contest therefore is, whether the words "within two calendar months next after the date of shipment named in the contract," mean next after the time when the shipment was actually completed, or next after the time for shipment limited by the contract. It will be necessary for us in the first instance to consider whether this matter has not been decided in a manner binding on the plaintiff by the award of the 31st of August, 1866. That award was founded upon the 7th and 8th rules of the Liverpool Cotton Brokers' Association, by which it is declared that, "in case of any dispute arising out of a contract," the matter shall be referred to two members of the association, with power to them to call in a third, and with a proviso that, in case of one of the parties appointing an arbitrator and the other neglecting to do so within a given time, &c., the matter shall stand

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referred to two arbitrators to be nominated by the chairman or president of the association. It should seem that the award was made in fact in pursuance of those rules, and upon the very point in question; and it was an award which was adverse to the plaintiff: and the question is whether it is a valid and binding award upon him. As the award upon the face of it is in apparent compliance with the rules, the parties are bound by it, unless either of the objections which have been urged on the part of the plaintiff be held to prevail. Now, it was urged in the first place that the award was void because the question whether the declaration of the ship or ships was made in time, was not a dispute "arising out of the contract," within the 7th rule, but a dispute as to the construction of the contract itself quite irrespective of the mode of performing it. I cannot accede to that criticism. The language used is metaphorical, and is quite as applicable to a dispute about the meaning of the words of the contract necessitating a reference to arbitration, as to a breach of the contract itself. I am utterly unable to distinguish between the contract and the breach of it in this respect. It appears to me that the dispute as to the time within which the ship was to be named was one which by the express terms of the contract the arbitrators had power to hear and determine. The next objection urged was that it was not competent to the chairman or president of the association to change the arbitrator as he did. It appears that a Mr. Charlton Jones was originally appointed by the defendant to act as arbitrator on his behalf; that, the plaintiff having failed upon due notice to name his arbitrator, the president, in pursuance of the power given to him by the 8th rule, appointed two persons to act, viz. Mr. Jones and a Mr. Durning; that, upon this being communicated to the plaintiff, he suggested to the president, that, inasmuch as Mr. Jones had been nominated by the defendant, some independent person ought to have been selected; whereupon the president, yielding to the plaintiff's objection, appointed a Mr. Habershon in his stead; and that the award was made by Mr. Durning and Mr. Habershon. This objection appears not to have been put forward at the trial, and certainly is not reserved by the learned judge. My strong impression is that there is nothing in it. The substitution of the one arbitrator for the other having been made at the

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plaintiff's own suggestion, I think he ought not to be allowed to complain of it. It is enough, however, to say that the point was not raised or reserved. It was then objected that the award was bad, because the plaintiff had no notice of the meeting of the arbitrators, nor any opportunity of being heard before them. It seems that the only intimation the plaintiff had of the appointment of Mr. Habershon was the letter addressed by the president to each party on the 31st of August, and that, within two hours after the receipt of that letter by the plaintiff, he had notice that the arbitrators had made their award. The decision of the arbitrators appears to have been based entirely upon the letters and documents, which it was conceded had been fairly laid before them; and no doubt they were competent persons to deal with such a matter. But the objection is that the arbitrators gave the plaintiff no opportunity of being heard; and I am of opinion that, if this objection were raised in the course of a proceeding in which it was competent to the plaintiff to raise it, and it was fairly raised, the award could not be allowed to stand. It must be admitted that the plaintiff had no opportunity of being heard upon the question of the construction of the documents which were put in; and, as at present advised, I think it is no answer to say that the result would have been the same if he had been heard. Having made these remarks, I now come to the dry question of law, viz. whether the form in which the objection is made here is the form in which it was competent to the plaintiff to make it,—whether the not having given the party an opportunity of being heard is an objection which can be raised by plea, or only a sort of misconduct of the arbitrators to be taken advantage of by a motion to set aside the award. Upon the best consideration I can bring to the case, I have come to the conclusion that the latter is the only mode in which such an objection can be urged. It was certainly not put too high by Mr. Brett when he said that it is one of the first principles of justice that no man's rights shall be adjudicated upon without giving him an opportunity of being heard in support of them. It is a principle which is universally recognised, and has frequently been acted upon in this Court (1); and indeed it is admitted when it is said that an award made in viola-

(1) See *Cooper* v. *Wandsworth Board of Works*, 14 C. B. (N.S.) 180,

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tion of it may be set aside by the Court on motion. It has been very forcibly urged that the whole proceeding in this case is void; and the instance has been put of judgments of foreign courts, to which the courts of this country will give no effect where they are shewn to have been obtained without giving the defendant an opportunity of being heard, and so are contrary to natural justice. If an arbitrator stood in the same position as an ordinary judge, the argument would be conclusive. But he does not. He is selected by the parties themselves, who stipulate with one another to abide by his decision. It is for this reason that an arbitrator stands in a different position from a judge whom the litigants have no opportunity of selecting. Here the arbitrators, in default of nomination by the parties pursuant to the 7th rule, were under the 8th to be selected by the president of the association. It seems not to be unreasonable that the misconduct of such an arbitrator should stand upon the same footing whether it be great or small. Suppose an arbitrator were to place a half-hour glass before him, and to limit the hearing of each side to that space of time, and so cut short the lengthiest, that would be a matter which might be brought before the Court upon motion (not by plea), when, if it appeared that any injustice had been done, the Court might interfere upon reasonable terms; but it clearly would not be ground for setting aside the award under all circumstances. That the defendant has not been sufficiently heard is not an objection that can be raised by plea, but only by motion. If the party omits to take that course within the period limited by the practice of the Court, he must be taken to have waived it. I am unable to draw any distinction between an insufficient hearing and a case where only the argument of the parties has been lost. The course of reasoning and the authorities cited combine to shew that such an objection cannot be taken by plea. Insufficiency or want of hearing must be urged as a ground for setting aside the award on motion, and cannot be set up as a bar to an action upon it. Upon this ground I think the rule must be discharged. And this makes it unnecessary for us to give any decision upon the other points, which we should prefer to abstain from doing, lest anything we might say should prejudice other cases which are now pending.

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KEATING, J. I also am of opinion that, under the circumstances, and looking at the time and manner in which it is sought to impeach it, the award in question is binding and conclusive. Mr. Brett in the first instance sought to impeach it on the ground that the matter decided by the arbitrators was not a dispute arising out of the contract, within the meaning of the parties; and he attempted to draw a distinction between a dispute as to the mode of performing the contract and a dispute as to the construction of the contract itself. Probably there is that distinction. But, looking at the terms of this contract, the question is, whether the parties contemplated any such distinction. It seems to me that they did not. It is an agreement by mercantile men to refer to merchants any dispute between them which might arise out of the contract. They never could have intended to exclude what two mercantile men might consider to be the construction of the contract. The next ground of objection was abandoned, because it seems not to have been taken at the trial. If it had been necessary to express any opinion upon it, I must own that my impression coincides with that of my Brother Willes. It was then urged that the award was void, because it was made under circumstances which shewed the proceeding to be contrary to natural justice, the plaintiff not having been afforded an opportunity of being heard before the arbitrators. I confess I was a good deal impressed by that argument; for, it is repugnant to one's ideas of justice that a man should be bound by the decision of a tribunal before which he has not been heard or been allowed an opportunity of being heard. But, upon mature consideration, I think we are not now called upon to decide whether or not the plaintiff was or might have been heard, but simply whether the objection has been taken in a way to make it available,—or, in other words, whether the want of hearing can be pleaded in bar to an action upon the award. Mr. Brett admitted that he could find no case where such a matter had been pleaded: and it seems to me that there are authorities the other way. The decision in *Braddick* v. *Thompson* (1), notwithstanding the observations of Lord Ellenborough, proceeded upon the ground that advantage could only be taken of the misconduct of an arbitrator selected by

(1) 8 East, 344.

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the parties to be the judge between them, by an appeal to the equitable discretion of the Court. If the decision proceeded upon that ground, then the case is a distinct authority on the present occasion. The third plea there disclosed misconduct on the part of the arbitrator approaching very closely to that which has been suggested here. In truth, the whole question resolves itself into this, was that which is relied upon misconduct in the arbitrators? If it was, it can only be taken advantage of by motion, and not by plea. The distinction is well pointed out in the judgment of the Exchequer Chamber in *Whitmore* v. *Smith* (1), where the propriety of enforcing it is strongly insisted upon. "The importance," says the Court, "of maintaining this distinction will be obvious when it is considered that, upon an application to the equitable jurisdiction of the Court, a person who had taken a benefit under the award could not be heard to object, at least not without giving up the benefit; that, upon such an application, the alleged defect of the award might be cured by abandoning the peccant items; or that the Court might, in its discretion, send back the matter for re-consideration by the arbitrators: whilst, upon the plea, the award must be held good or bad, simpliciter, without regard to any of these equitable considerations." It therefore appears to me, upon the authorities, that this objection is not one which can be taken advantage of by plea; though my impression is that it would have been a valid objection if taken in the proper way. This disposes of the rule, which is enough for the purpose of to-day. If it be necessary to go further, I should desire time to consider.

MONTAGUE SMITH, J. I am of the same opinion. In answer to this action, the defendant relies upon an award; and he is entitled to succeed unless either of the objections urged against that award is well founded. The first objection urged is, that a dispute as to the true construction of the contract is not such a "dispute arising out of the contract" as was intended by the parties to be submitted to arbitration. It seems to me, however, that such a dispute is entirely within the limits of the submission. It was impossible for the arbitrators to arrive at any conclusion as to the performance of

(1) 7 H. & N. 509.

the contract without first ascertaining what were its terms. I cannot for a moment conceive that the parties to this contract did not intend that the arbitrators should settle the whole matter: and I think no persons could be more fit to say what the rules meant than those who framed them, and that it would be most unfortunate if the Court were to come to a different conclusion. The only other objection which need be noticed is, that the award is void because the plaintiff had no opportunity of being heard before the arbitrators. I for one should insist most strongly upon the duty of an arbitrator to give the parties a fair opportunity of having their cases heard. But I should be equally strenuous in sustaining an award where the party who complains has allowed the proper time for urging such an objection to go by, and has reserved it for a defence to an action upon the award. However, I feel precluded by the authorities from holding that an objection of this sort can be the subject of a plea. As I read the cases referred to in the note to *Veale* v. *Warner* (1), and especially *Braddick* v. *Thompson* (2), and the cases which followed it, the Courts seem invariably to have laid it down that misconduct on the part of an arbitrator cannot be set up by a plea of nul tiel agard. The Court of Chancery might always have been applied to to relieve a party from the performance of an award where the conduct of the arbitrator or of the opposite party had been such as to make it inequitable to enforce performance. The Court of Chancery and the Courts of common law, since the statute of William (3), which was passed to obviate the hardship of driving the parties to a Court of equity, would upon a proper application take all the circumstances into their consideration, and would probably not set the award aside, but would send it back for a re-hearing. Not having adopted the course which was open to him, the plaintiff must be taken to have acquiesced in the decision of the arbitrators. There is no greater hardship in this than occurs in many other cases where an irregularity is held to be waived by acquiescence. For these reasons I am of opinion that both objections fail.

Russell intimated that the plaintiff would not press for judgment upon the other point.

(1) 1 Wms. Saund. 327 *a*, n. (3). (2) 8 East, 344.
(3) 9 & 10 Wm. 3, c. 15.

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WILLES, J. The only effect, if the plaintiff had been successful, would have been to send the case back to the arbitrators, and not to set the award aside.

Rule discharged.

Attorneys for plaintiff: *Field, Roscoe, Field, & Green.*
Attorneys for defendant: *Chester & Urquhart.*

Jan. 25.

IMHOF AND ANOTHER *v.* SUTTON.

Arbitration—Compulsory Reference under the Common Law Procedure Act, 1854, s. 3—*Charge of Fraud.*

The mere fact that some one item in the account may involve a charge of fraud does not oust the jurisdiction of the judge at chambers to order that the cause be referred to the master, under the 3rd section of the Common Law Procedure Act 1854 (17 & 18 Vict. c. 125).

THIS was an action brought to recover a balance of 636*l.* 13*s.*, alleged to be due from the defendant to the plaintiffs on an account for goods sold, money had and received, and money lent. The particulars of demand delivered originally contained the following item:—

"1864. Money had and received for the use of the plaintiffs, being commission paid by the plaintiffs to the defendant for orders for musical instruments which the defendant alleged he had obtained, but which orders were fictitious . . . £514 0 0"

By a further particular delivered pursuant to a judge's order, the above item of 514*l.* was made up as follows:—

		£	*s.*	*d.*
"1864. Nov. 5.	Paid by plaintiffs to defendant .	50	0	0
" "	Credited to Dr. Sarjeant, otherwise Crowther Smith, 150*l.*, which defendant represented to plaintiffs Sarjeant was to pay him on plaintiffs' account	150	0	0
	Carried forward .	£200	0	0

		£	s.	d.
	Brought forward . .	200	0	0
"1864. Dec. 24.	Bill for 250*l.*, at six months, given by plaintiffs to defendant, and taken up by plaintiffs at maturity	250	0	0
„ Dec. 31.	By cheque of plaintiffs paid to defendant	50	0	0
"1865. Jan. 12.	Cash paid by plaintiffs to defendant	14	0	0
		£514	0	0'

On the 26th of December, 1866, an order was made by Willes, J., on the application of the plaintiffs, to refer the cause to one of the masters of the court, under the 3rd section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125).

Kenealy, on behalf of the defendant, obtained a rule nisi to set aside the order, on the ground that the plaintiffs' claim in respect of the 514*l.* involved a criminal charge against the defendant, viz. the obtaining of money by false pretences, and therefore was not the proper subject of a reference, but ought to be submitted to a jury.

Oppenheim shewed cause. The 3rd section of the Common Law Procedure Act, 1854, provides that, "if it be made appear, at any time after the issuing of the writ, to the satisfaction of the Court or a judge, upon the application of either party, that the matter in dispute consists *wholly or in part* of matters of mere account which cannot conveniently be tried in the ordinary way, it shall be lawful for such Court or judge, upon such application, if they or he think fit, to decide such matter in a summary manner, or to order that such matter, either wholly or in part, be referred to an arbitrator appointed by the parties, or to an officer of the court," &c. This being a case involving matters of account which could not conveniently be submitted to a jury, and the learned judge having in the exercise of his discretion made an order to refer it to the master, the Court will not interfere upon a mere suggestion that the bona fides of the defendant in respect of certain transactions

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involved in one of the items may possibly come in question. In *Insull* v. *Moojen* (1), this Court held that the mere fact of a matter of fraud coming in question before the arbitrator was no ground for his declining to proceed with the reference.

[BOVILL, C.J. Whatever question may incidentally arise in the course of a reference, the master is bound to proceed so long as the order stands.]

There is no reason for saying that the master is a less fit tribunal for an inquiry into the conduct of the defendant in respect of the orders alleged to have been obtained by him than a jury.

Kenealy, in support of the rule. This is not a case in which, if the matter had been fairly brought to the attention of the learned judge, he would have made the order. Of the balance of 636*l.* 13*s.*, the principal part consists of a sum of 514*l.* which the plaintiffs seek to recover from the defendant as commissions which they had paid to him on orders for musical instruments, which orders they alleged to be fictitious, in other words, fraudulent. It never could have been intended by the legislature that such a claim as that should rank with actions of account.

[KEATING, J. In almost every case where commission on sales is claimed there is a suggestion that the agent has charged for orders which were never obtained.]

That is very different from this case. This part of the plaintiffs' demand is altogether founded upon a charge of fraud and false pretences,—matters which the defendant clearly has a right to have investigated before a jury.

[BOVILL, C.J. The question is, whether this claim does not consist wholly or in part of matters of mere account which cannot conveniently be tried in the ordinary way.]

The 4th section of the statute, which provides that, if it shall appear to the Court or a judge that the allowance or disallowance of any particular item or items in such account depends upon a question of law fit to be decided by the Court, or *upon a question of fact fit to be decided by a jury*, a case may be directed to be stated or an issue to be tried, exercises a controlling force over s. 3. In *Pellatt* v. *Markwick* (2), the Court refused to refer to the master

(1) 3 C. B. (N.S.) 359; 27 L. J. (C.P.) 75.
(2) 3 C. B. (N.S.) 760.

an action upon bills of exchange, under this statute, on the ground that the question at issue was not matter of mere account.

[MONTAGUE SMITH, J. The bills there being the only matter in the action, there was no reason for saying that that could not conveniently be tried in the ordinary way.]

BOVILL, C.J. The particulars of demand disclose a claim made by the plaintiffs against the defendant of a balance of 636*l.* 13*s.* upon an account consisting of numerous items for goods sold and moneys lent, with credit given on the opposite side for goods returned. Part of the claim, and a considerable part of it, viz. 514*l.*, is made up of five items, which are charged as "money had and received for the use of the plaintiffs, being commission paid by the plaintiffs to the defendant for orders for musical instruments which the defendant alleged he had obtained, *but which orders were fictitious.*" In that state of things it is clear that the matter in dispute in part consists of matters of mere account, and consequently the learned judge had jurisdiction under the statute to order the cause to be referred to the master; and the discussion which we have heard to-day has satisfied my mind that it is a matter which could not be conveniently tried before a jury. I therefore think the learned judge exercised a proper discretion in making the order, and that this rule should be discharged.

KEATING, J. I am of the same opinion. It is not matter of pure fraud that is charged. It is mixed up with matters of mere account. The items to which my Lord has referred are in some sense matters of mere account. I entirely agree with him that this is a fit case for inquiry before the master, and cannot conveniently be tried before a jury.

MONTAGUE SMITH, J. I am of the same opinion. It is not possible to lay down any general rule for the guidance of the judges in the exercise of this jurisdiction. If the jurisdiction existed in this case, it is not good for us to interfere. To create the jurisdiction, the cause of action must consist wholly or in part of matters of mere account which cannot conveniently be tried in the ordinary way. I think this case falls perfectly within that

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category, and that the jurisdiction of the judge is not ousted by reason of the circumstance that some one of the items may involve a charge of fraud.

Rule discharged, with costs.

Attorneys for plaintiffs: *Chapman & Clarke.*
Attorney for defendant: *C. V. Lewis.*

Feb. 5.

[IN THE EXCHEQUER CHAMBER.]

GRAVES *v.* ASHFORD AND ANOTHER.

Copyright of Engravings within 8 *Geo.* 2, *c.* 13, 7 *Geo.* 3, *c.* 38, *and* 17 *Geo.* 3, *c.* 57—*Piracy by Means of Photography—Name of Proprietor.*

The piracy of a picture or engraving by the process of photography, or by any other process, mechanical or otherwise, whereby copies may be indefinitely multiplied, is within the statutes 8 Geo. 2, c. 13, 7 Geo. 3, c. 38, and 17 Geo. 3, c. 57, for the protection of artists and engravers.

Gambart v. *Ball*, 14 C. B. (N.S.) 306, 32 L. J. (C.P.) 166, affirmed.

The 8 Geo. 2, c. 13, requires, as the condition upon which the protection is afforded, that the name of the *proprietor* shall appear upon every plate and print. The name of the proprietor appeared thus:—"London: Published by Henry Graves & Company, May 1st, 1861, Printsellers to the Queen, 6, Pall Mall:"—

Held, that this was a sufficient compliance with the requirement of the statute.

The person intended to be designated by the words "and Company," was a person to whom Mr. Graves paid a fixed sum monthly out of his business:—

Held, that this did not constitute this person a partner or part "proprietor," so as to require his name to appear on the plate or print.

1. THIS was an action for an alleged infringement of the plaintiff's copyright in three engravings, viz. 1. An engraving from a picture by Faed, called "My Ain Fireside;" 2. An engraving from another picture by Faed, called "Daddy's coming;" 3. An engraving by Sir Edwin Landseer, called "The Highland Nurses."

2. The first count of the declaration stated that, before and at the time of the committing of the respective grievances by the defendants as thereinafter mentioned, the plaintiff was, and still remained, the proprietor of a certain print called "My Ain Fireside," which the plaintiff had caused to be engraved from a picture by Thomas Faed, R.A., and which print had been so engraved in England, and was printed and first published in England on the

1st of May, 1861, and within twenty-eight years before the committing of the grievances, and which day of the first publishing of the said print, together with the name of the plaintiff (who then was and from thence hitherto had been and still was the proprietor of the said print), was before and at the time the said print was so first published as aforesaid, and from thence continually hitherto, truly engraved upon each plate upon which the said engraving was made, and from which the said prints were printed, and which said day of the first publishing of the said print, together with the name of the plaintiff, was truly printed upon every print taken or printed from such plates, or any or either of them; and that, at the several times of the committing by the defendants of the respective grievances thereinafter mentioned, the plaintiff was entitled under the acts of parliament in that behalf to the sole right and liberty of printing and reprinting the said print: First breach,—that the defendants, well knowing the premises, but contriving and wrongfully and fraudulently intending to injure the plaintiff, and to deprive him of the profits and advantages which he might and otherwise would have derived from the said print, and also to deprive him of his copyright therein, theretofore, and after the passing of the 17 Geo. 3, c. 57, intituled, &c., and within six calendar months next before the commencement of the suit, and within twenty-eight years from the said first publishing of the said print, wrongfully, and without the consent in writing of the plaintiff signed by him, or any other consent of the plaintiff, did on divers days and times before the commencement of the suit, in England aforesaid, copy *in the whole* the said print, contrary to the form of the statute in such case made and provided. The second breach was for copying *in part* the said print; and the third for unlawfully *publishing and selling* divers of the prints.

3. The second count, relating to the engraving called "Daddy's coming," and the third count, relating to the engraving called "The Highland Nurses," respectively, were the same as the first, mutatis mutandis in respect of the name, the painter, and the date of first publication.

4. The defendants pleaded,—first, not guilty,—secondly, that the plaintiff was not the proprietor or entitled to the sole right and liberty of printing and reprinting the said prints,—thirdly,

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that the plaintiff did not cause the said prints or any of them to be so engraved as in the declaration stated,—fourthly, that the prints in the first, second, and third counts mentioned were not first published on the days mentioned, and that the day of the first publishing the same respectively was not, together with the name of the plaintiff as the first publisher thereof, truly engraved upon each such plate, as in those counts mentioned,—fifthly, that the respective days of first publishing the said prints in the first, second, and third counts respectively mentioned, were not, together with the name of the plaintiff as the proprietor of the said prints, or at all, printed upon such prints, as in the first, second, and third counts respectively mentioned,—sixthly, that, before the committing of the alleged grievances or any of them, the plaintiff printed and published and sold, and caused and knowingly permitted to be printed and published and sold, divers, to wit, fifty, prints printed and taken from each of the said engravings in the first, second, and third counts respectively mentioned, without having the day of the first publishing thereof respectively, or the name of the proprietor thereof, printed thereon,—seventhly, that the causes of action in the declaration mentioned did not accrue at any time within six calendar months next before the commencement of the suit, nor was the action commenced or prosecuted within six calendar months after the grievances in the declaration mentioned were committed. Issue thereon.

5. The cause came on for trial at Guildhall, at the sittings after Michaelmas Term, 1865, before Erle, C.J.

6. At the trial a print from each of the engravings was produced,—which prints were to accompany and form part of the case. Similar prints to these had been from time to time published and sold by the plaintiff. Evidence was given that photographs taken from and representing respectively the subjects of the two engravings called "My Ain Fireside" and "Daddy's coming" (and which photographs were also to accompany and form part of the case), were sold by the defendants within six calendar months before the suit, without any consent from the plaintiff. The photographs were proved to have been taken by photography, and not by any process of engraving. It was objected by the defendants' counsel that they were not copies of the prints within the

meaning of the statutes relating to the copyright of engravings. The point thus raised was stated by counsel to be the same as that decided in the case of *Gambart* v. *Ball* (1), which case the defendants were desirous of having reviewed. The Lord Chief Justice overruled the objection: but, in order that the above case might be reviewed, reserved leave to the defendants to move to enter a verdict on the point.

7. Evidence was given that the publication line was on all the prints of the engravings, as well as on the plates. On the plate and prints of "My Ain Fireside," it was as follows,—"London: Published by Henry Graves & Company, May 1st, 1861, Printsellers to the Queen, 6, Pall Mall." The publication line on the plates and prints of the other engravings was the same, with the exception of the date, which varied, and which was proved by the plaintiff to be the day of the first publication of such print. There was no other statement on the prints or plates of the name of the proprietor, or anything else to shew who was the proprietor.

8. The plaintiff, on his examination at the trial, stated that he had bought of the painters of the pictures from which the said engravings were made the right to take engravings from each of the pictures, and had employed the engravers by whom they were engraved to engrave the same, and had paid them for so doing; that he had for some years carried on business under the firm of Henry Graves & Co.; and that he had a partner in his business whom the expression "Company" represented: but he afterwards said that what he meant was, that such person had a fixed sum every month out of his (the plaintiff's) business.

9. Two other points were then taken by the defendants' counsel, who contended,—first, that, as a matter of law, upon the above evidence the plaintiff appeared not to be the sole proprietor of the said prints,—secondly, that, even if he were sole proprietor, the publication line did not sufficiently shew who the proprietor was, to be a compliance with the requisites of the statute 8 Geo. 2, c. 13, as to engraving and printing the day of the first publishing, with the name of the proprietor, on each plate and print.

10. His Lordship ruled both points in favour of the plaintiff, but reserved the second of them, giving the defendants leave to move

(1) 14 C.B. (N.S.) 306; 32 L. J. (C.P.) 166, 9 Jur. N.S. 1059

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to enter a verdict for them in respect thereof. The other of the two points was not reserved; and the defendants' counsel did not require any question to be left to the jury respecting it: and a verdict was found for the plaintiff on the last breach of each of the counts, and on all the issues joined relating to the same, with 40*s.* damages on such breaches on the first and second counts, and 40*s.* damages on such breach to the third count.

11. In pursuance of the leave reserved as above stated, and on other points reserved relating only to the last count, and also on the point so taken as aforesaid but not reserved, the defendants in Hilary Term, 1866, moved for, amongst other things, a rule calling on the plaintiff to shew cause why the verdict found for the plaintiff on the last breach of each of the three counts should not be set aside and a verdict entered thereon for the defendants on the points so reserved, or a new trial had on the other point so taken as aforesaid but not reserved.

12. The Court of Common Pleas granted a rule on certain points relating only to the last count, which has since been made absolute by consent; but they refused it as to the rest,—giving the defendants leave to appeal.

The question for the Court of error was, whether, upon the points reserved at the trial, or either of them, the defendants were entitled to have a verdict entered for them on any or either and which of the issues joined on the pleas so far as they related to the first and second counts of the declaration, and whether a new trial ought to be granted on the point taken at the trial, which was not reserved.

The appeal came on for argument in the Exchequer Chamber on the 5th of February, 1867, before Kelly, C.B., Bramwell, B., Mellor, J., Pigott, B., Channell, B., and Lush, J.

Coleridge, Q.C. (*Rew* with him), for the defendants. The main question is whether copying by means of photography is within the prohibition of the statutes for the protection of copyright in engravings. The material statutes to be considered are, the 8 Geo. 2, c. 13, 7 Geo. 3, c. 38, 17 Geo. 3, c. 57, 6 & 7 Wm. 4, c. 59, and 15 & 16 Vict. c. 12. The object to be collected from the earlier statutes was the protection of artists and engravers against injury to their

pockets and reputation by the making and vending of inferior, spurious, and discreditable copies of their works, intended to be mistaken for the real and original works. This is manifest from the recitals in the 8 Geo. 2, c. 13, and 17 Geo. 3, c. 57, which are carefully followed in the enacting parts. A copy by means of photography, never could be mistaken for the original engraving, and therefore is not within the evil pointed at.

[LUSH, J. The avowed object of the first act, 8 Geo. 2, c. 13, was the encouragement of the arts of designing, engraving, and etching, by creating a property in his work in the engraver.

MELLOR, J. The recital in the 8 Geo. 2, c. 13, is, that "divers persons have by their own genius, industry, pains, and expense, invented and engraved or worked in mezzotinto or chiaro oscuro sets of historical and other prints, *in hopes to have reaped the sole benefit of their labours.*" You would reject these latter words.]

No. It is not necessary that the artist should suffer both in reputation and in pocket by the infringement: if either suffers, the protection applies.

[KELLY, C.B. The copy may peradventure surpass the original.]

The plate, the instrument of the mischief, is to be given up to be destroyed or "damasked." The imitation or copying, therefore, which is pointed at, is to be by means of a plate.

[LUSH, J. Wood or stone, you contend, would not be within the prohibition?]

Lithography is provided for by a subsequent statute, 15 & 16 Vict. c. 12, s. 14.

[LUSH, J. Because doubts were entertained as to whether the former acts applied to it.]

The word "copy" is for the first time used in the 17 Geo. 3, c. 57, in the sense of a substitution. Copying there means imitating in whole or in part any other work.

[BRAMWELL, B. Suppose a line engraving were copied in mezzotint, would that be an infringement of the copyright, within these acts?]

To make the argument consistent, it must be contended that it would not. The 15 & 16 Vict. c. 12, s. 14, which enabled the Queen to have international copyright by treaty, declares that the

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provisions of the former acts and of the 6 & 7 Wm. 4, c. 59, which extended the law of copyright in engravings to Ireland, "are intended to include prints taken by lithography or any other *mechanical* process by which prints or impressions of drawings or designs are capable of being multiplied indefinitely, and the said acts shall be construed accordingly."

[LUSH, J. If the word "mechanical" had not been found there, there could not have been a shadow of doubt.]

If photography had been intended, it would doubtless have been mentioned; for the art was about fifteen years old at the time of the passing of that statute. It is observable that it is most carefully excluded by the use of words which do not include it. The 25 & 26 Vict. c. 68, s. 1, deals with photography, giving to photographs the same protection which engravings and etchings before enjoyed. These statutes, which create a monopoly, and are highly penal, are not to be extended to new modes of multiplying copies, without express words, or some overwhelming reason. The terms "prints or impressions," used in the protecting acts, are wholly inapplicable to the mode of producing copies by photography. A copy is defined by Bayley, J., in *West* v. *Francis* (1), to be "that which comes so near to the original as to give to every person seeing it the idea created by the original." The notion of piracy can hardly attach to that which is not a deceptive imitation: it means the taking advantage of another man's labour. It cannot be said that every sort of imitation would be within these acts; for instance, a photograph an inch square of a large picture. No one could mistake the one for the other. The 1st section of the 8 Geo. 2, c. 13, confers the copyright only on condition that the date of the first publishing, with the name of the proprietor, shall be engraved on each plate and printed on every print. Is that which is called the "publication line" here, "London: Published by Henry Graves & Company, May 1st, 1861, Printsellers to the Queen, 6, Pall Mall," a statement of the proprietorship of the print within the meaning of the statute? Does it give the information which the act requires? Primâ facie, the publisher would be some one distinct from the proprietor.

(1) 5 B. & A. 737, 743.

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[LUSH, J. The statute does not require the name of the publisher, but only the name of the proprietor. It does not, however, say that he shall be called the proprietor. Would not "Henry Graves," with the date of publication, be enough?]

It is submitted that it would not. Then, it appeared that there was a person who had an interest, but whose name was not given, viz. Mr. Graves's partner. This clearly was not a compliance with the statute.

Sir R. Collier, Q.C. (with him *Prentice*, Q.C.), for the plaintiff, was not called upon.

KELLY, C.B. We are all of opinion that the judgment of the Court of Common Pleas should be affirmed. The question, which arises upon the acts of parliament relating to copyright of engravings, is, whether the inventor or proprietor of an engraving is protected by those statutes against an infringement of his copyright by means of the modern art called photography, a process whereby pictures as well as engravings can be most accurately copied, and the copies multiplied to any conceivable extent. In order to determine whether a copy obtained by means of photography is within those acts, we must look at their particular words; for, however clearly we can see that it is within the mischief those acts were designed to remedy, unless the words which the legislature has used point to copies thus effected, we should not be at liberty to extend their operation for the purpose of including them. The first of those acts, the 8 Geo. 2, c. 13, is intituled "an act for the encouragement of the arts of designing, engraving, and etching historical and other prints, by vesting the properties thereof in the inventors and engravers, during the time therein mentioned." Its object, therefore, was to encourage the arts of designing and engraving, by clothing the designer or engraver with copyright, that is, the exclusive privilege of producing and selling copies of his works. The act then recites that "divers persons have by their own genius, industry, pains, and expense, invented and engraved or worked in mezzotinto or chiaro oscuro sets of historical and other prints, in hopes to have reaped the sole benefit of their labours." It is impossible to look at that recital without seeing that the intention of the legislature was

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pointedly opposed to the contention which has been urged on the part of the defendants; because, if copies of an engraving might be multiplied by this new process, so as they did not profess to be originals, any one who had skill enough to make a copy equal or superior to the original might intercept the profit which ought to go to the original engraver, and leave him altogether without protection. Let us go on and see whether this sort of piracy is not within the express words of the statute. The recital proceeds, "and that print-sellers and other persons have of late, without the consent of the inventors, designers, and proprietors of such prints, frequently taken the liberty of copying, engraving, and publishing, or causing to be copied, engraved, and published, base copies of such works, designs, and prints, to the very great prejudice and detriment of the inventors, designers, and proprietors thereof." It then proceeds to enact that "every person who shall invent and design, engrave, etch, or work in mezzotinto or chiaro oscuro, or from his own works and invention shall cause to be designed and engraved, etched, or worked in mezzotinto or chiaro oscuro, any historical or other print or prints, shall have the sole right and liberty of printing and re-printing the same for the term of fourteen (by a subsequent statute, 7 Geo. 3, c. 38, s. 7, extended to twenty-eight) years, to commence from the day of the first publishing thereof, which shall be truly engraved, with the name of the proprietor, on each plate, and printed on every such print or prints; and that, if any print-seller or other person whatsoever, within the time limited by this act, shall engrave, etch, or work as aforesaid, or in any manner copy and sell, or cause to be engraved, etched, copied, and sold, in the whole or in part, by varying, adding to, or diminishing from the main design, or shall print, re-print, or import for sale, or cause to be printed, re-printed, or imported for sale, any such print or prints, or any parts thereof, without the consent of the proprietor or proprietors thereof," shall incur certain penalties. Some criticism has been offered on the expression "base copy;" and it has been suggested that a thing would not be a base copy, which was avowed to be a copy, and did not profess to be the original from which it was taken. It seems to us that to put that construction upon the word "base" would be cutting down the meaning of the legislature to a most mis-

chievous extent, and working great injustice to the author. Anything is, in our opinion, a "base copy," within the language of this statute, which is not the genuine work of the author. Such being the language of the first statute of the series, let us turn to the subsequent provisions of the 7 Geo. 3, c. 38, and 17 Geo. 3, c. 57,—upon the words of the latter of which the argument in *Gambart* v. *Ball* (1) as well as in the present case mainly turned. We have to determine what is the protection given by these acts, and what it is that is expressly prohibited, and whether the photographic copy which has been produced before us is or is not a "copy" within the meaning of those statutes. The 7 Geo. 3, c. 38, recites that the former act had been ineffectual for the purposes thereby intended, and extends the benefit of its protection to some works not included in the 8 Geo. 2, c. 13. Then comes the 17 Geo. 3, c. 57, which, after reciting that the former acts "had not effectually answered the purposes for which they were intended, and that it was necessary, for the encouragement of artists, and for securing to them the property of and in their works, and for the advancement and improvement of the aforesaid arts, that such further provisions should be made as were thereinafter mentioned and contained," enacts that, "if any engraver, etcher, print-seller, *or other person*, shall within the time limited by the aforesaid acts or either of them, engrave, etch, or work, or cause or procure to be engraved, etched, or worked, in mezzotinto or chiaro oscuro, *or otherwise or in any other manner copy*, in the whole or in part, by varying, adding to, or diminishing from the main design," or shall print, &c., for sale, or shall sell, any copy or copies of any print, &c., without the consent of the proprietor, shall be liable to an action for damages, and to double costs. Upon what reasonable ground can it be contended that a photographic copy of a print, which presents to the eye a complete and accurate copy of the original, does not fall within these general words "or otherwise or in any other manner copy?" Unless the ordinary rules for the interpretation of language are to be disregarded, I can come to no other conclusion than that this is a "copy" within that statute. If both were of the same dimensions, the copy is hardly to be distinguished from the original;

(1) 14 C. B. (N.S.) 306; 32 L. J. (C.P.) 166.

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and the thing cannot be said to cease to be a copy by reason of its diminished size. As far, therefore, as these three statutes of 8 Geo. 2, c. 13, 7 Geo. 3, c. 38, and 17 Geo. 3, c. 57, are concerned, the case is to my mind entirely free from doubt. I think the imitation of a work of art by means of photography is within both the mischief and the express words of the statute. But we have been referred to two later statutes, viz. the 15 & 16 Vict. c. 12, which relates to lithography, and the 25 & 26 Vict. c. 68, which relates to photography. The point made upon these two statutes in substance is, that, from the language there used by the legislature, and especially in the last-mentioned act, it is clear that photographic pictures were not protected by the statutes of Geo. 2 and Geo. 3; and, because they are not within the protection, so it is contended they are not within the prohibition, of those acts or subject to the penalties thereby imposed. The protecting and the prohibitory clauses, however, are expressed in totally different language. The act of parliament conferring the protection (7 Geo. 3, c. 38, s. 1) are, "all and every person and persons who shall invent or design, engrave, etch, or work in mezzotinto or chiaro oscuro, or from his own work, design, or invention shall cause or procure to be designed," &c., any prints, &c., "shall have, and are hereby declared to have, the benefit and protection of the said act and this act." When we come to the prohibitory part of the 17 Geo. 3, c. 57, the words are, "if any engraver, etcher, print-seller, or other person, shall, within the time limited by the aforesaid acts or either of them, engrave, etch, or work, or cause or procure to be engraved, etched, or worked in mezzotinto or chiaro oscuro;" but the clause does not stop there; it proceeds, "or *otherwise or in any other manner* copy, in the whole or in part," &c., any print, &c., certain consequences shall follow. It is as if the legislature had contemplated that there might be some other hitherto undiscovered mode of copying works of art which they were unable at the time to describe in apt words, and therefore resort was had to the large and comprehensive words "or otherwise or in any other manner." It is obvious that the legislature could not, in providing for the protection of works of art, describe a piracy by means of a process not then within the knowledge of mankind. But it by no means follows that, when words large

enough to embrace it are used, the prohibition should not, as well as the protection, be extended to a subsequently discovered mode of reproducing and multiplying copies. It appears to us, therefore, that the argument derived from the 15 & 16 Vict. c. 12 and 25 & 26 Vict. c. 68 altogether fails; and that the effect of all the acts, taken together, is, that any process, whether known at the time, or the result of subsequent invention or discovery, by which pictures or engravings may be imitated or copied, is within the mischief as well as within the express words which the legislature has used. And we cannot help thinking that a more limited construction would be contrary to the whole spirit of the legislation on the subject, and productive of great injustice.

Two other points were urged, which are of a purely technical character. The first is, that the name of the proprietor did not appear upon the plates and prints, as required by the 8 Geo. 2, c. 13. Upon the engraving before us we find these words, "London: Published by Henry Graves & Co., May 1, 1861, Printsellers to the Queen, 6 Pall Mall." Subject to the other objection, which I will presently advert to, Henry Graves & Co. are the proprietors of the engraving. The question is whether the legislature, when they required the name of the proprietor to appear, required that he should be expressly described as being the proprietor. They certainly have not said so in terms; and we must put a reasonable construction upon the words they have used. Every one who is at all conversant with these things looks at what is called the "publication line" for the name of the proprietor. The name which appears on the face of the print must be assumed to be that of the proprietor; and it cannot alter the effect or be less a compliance with the act because he is called the publisher. I think the statute has been substantially and literally complied with. The other objection is still more critical and technical. It was said that the words "Henry Graves & Company" imported that Henry Graves had a partner, who primâ facie would be a part proprietor of the engraving; and that, as his name was not given, the act was not complied with. But, when Mr. Graves was examined at the trial, he stated that the person indicated by the words "and company" was a person to whom he paid a fixed sum every month out of his business. The payment to a person of a fixed sum

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periodically does not constitute that person a partner or part proprietor. The sole proprietor, therefore, of the pirated engravings was Henry Graves; and, as his name appeared thereon, the requirement of the statute was sufficiently complied with.

Upon the whole, we think that all the objections urged on the part of the defendants are unfounded, and that the plaintiff is entitled to retain his verdict; and we affirm the judgment of the Court below.

Judgment affirmed.

Attorney for plaintiff: *J. Bowen May.*
Attorneys for defendants: *Redpath & Holdsworth.*

Feb. 6.

[IN THE EXCHEQUER CHAMBER.]

JEGON *v.* VIVIAN.

Devise, Construction of—Power of Leasing—Lease of Mines, &c.

6 Ch. 748

A testator, by a will made in 1798, devised all the residue of his real estates to his daughter for life, without impeachment of waste save as thereinafter mentioned, and with a restriction against alienation; remainder to her first and other sons in tail, with some other remainders; remainder to T. P. in tail; remainder to the testator's right heirs. The will contained powers to the devisee for life to charge the property to a limited extent in favour of her husband and children; and it then gave to her, and to each tenant in tail, power to lease any of the *lands* for twenty-one years, and no more, for the best improved rent that could be got for them, with a reservation to the lessor of the right to work and take mines and minerals thereunder. Then followed a special reservation of all timber, woods, and underwood for twenty years from the testator's death. The will then proceeded,—"And it is my will and desire, and I do hereby order and direct . . . *that it shall and may be lawful for my said daughter to work, or contract for, lease, or set out to be worked and wrought*, all the coal, culm, &c., or other ore, mines, and minerals which are already known and discovered, or which may be hereafter found out and discovered in or under my real estates;" the "issues, proceeds, and profits" to be paid over to trustees, and to be by them laid out in the purchase of lands, to be settled to the same uses, &c., as the rest of the testator's estate. The devisee for life, who was the testator's only child, in 1840, in the exercise of this power, demised to M., for *twenty-one* years (or for *sixty* years, if she had authority to do so), "all the mines, &c., of coal, culm, &c., under three farms described, with liberty to the lessee, his executors, &c., to use all lawful means for finding any coal or culm, and raising it and disposing of it; to make shafts, watercourses, and railroads, and to use a sufficient part of the said land for placing coal to be raised therefrom, *and also any other coal;* to erect

engines for working the said mines, *or any other mines*; to build houses for the miners working the demised mines, *or mines belonging to any other person*; to do all such other acts in, under, or upon the said farms *as shall be deemed expedient in working the mines and seams of coal hereby demised, or belonging to any other person*; and to have ingress and egress for customers to carry away coal from the said mines, *or belonging to any other person*,"—making satisfaction to the tenants and occupiers for any damage occasioned by reason of the liberties and privileges thereby granted, and using and pursuing the same respectively. An annual rent of 40*l.* and certain royalties were reserved, and the lessee covenanted to pay rent, &c., to work the mines in a workmanlike manner, to make satisfaction for damage, &c.

In ejectment by T. P., the remainderman, against the lessee, the jury having found that the covenants contained in the lease were "usual, ordinary, and reasonable covenants:"—

Held, by the Exchequer Chamber,—reversing the *formal* judgment of the Court of Common Pleas (that Court having been equally divided),—that the will gave to the tenant for life merely a liberty to work the mines herself, or to contract with another for working them, and not a power to lease the mines for a term to extend beyond the duration of her life-estate.

Affd by H.L. 2 H & C 384

THIS was an appeal against the pro formâ decision of the Court of Common Pleas, discharging a rule to enter a verdict for the plaintiff in an action of ejectment tried before Blackburn, J., at the Glamorganshire spring assizes, 1865.

The question turned upon the construction of a power reserved by the will of one Leonard Bilson Gwyn to the devisee for life to "work or contract for, lease, or set out to be worked and wrought," the coal, culm, &c., or other ore, mines, and minerals in or under the estate devised. The material portions of the will are set out in the report of the case in the court below, ante, Vol. I. p. 9: 12 Jur. N.S. 184

The Court of Common Pleas were divided in opinion; Erle, C.J., and Willes, J., holding that the will gave the devisee for life an unconditional power to lease the mines, without any other limit for the duration of such leases, or any other condition for the exercise of the power, than would attach to and arise from the fiduciary capacity of the donee of the power; and Byles, J., and Montague Smith, J., holding that the provisions as to mining leases had reference to the restrictions upon the right of the tenant for life to commit waste, and was a mere *working power* over the minerals, given to the tenant for life, accompanied with restrictions as to the disposition of the proceeds, compelling her to capitalise the issues, proceeds, and profits for the benefit of those in

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remainder, and consequently that a lease of the mines granted by her for twenty-one years (or for sixty years conditionally) was void, or at all events could not extend beyond her life.

With a view to the judgment of a Court of error being taken on the question, Montague Smith, J., withdrew his judgment; and the case was argued in the Exchequer Chamber on the 29th and 30th of November, 1866, before Kelly, C.B., Channell, B., Mellor, J., Pigott, B., and Shee, J.

Mellish, Q.C. (with him *Joshua Williams, Q.C.*, and *J. O. Griffits*), for the plaintiff, contended that the view taken by Byles and Montague Smith, JJ., in the Court below, was the correct one; that the lease in question was not warranted by the power contained in the will; and that the intention of the testator was to give the tenant for life a mere working power, and not a power to lease the mines for a period extending beyond the duration of her own life: *Pigot* v. *Garnish.* (1) He further contended, that, assuming that the will conferred upon the tenant for life an unconditional power to lease the mines and minerals for any term of years, the lease in question was bad because it extended to matters which were clearly outside and beyond the limits of the power; and upon this point *Doe* d. *Lord Egremont* v. *Stephens* (2); *Doe* d. *Williams* v. *Matthews* (3); and *Dayrell* v. *Hoare* (4), were cited.

Sir R. Palmer, Q.C. (with him *H. Giffard, Q.C.*, and *G. B. Hughes*), for the defendant, contended that, though the will was very inartificially and unskilfully framed, the intention of the testator obviously was to benefit his daughter, the tenant for life, and that there should be no impediment to the working of the mines during her life-time; and that that intention could not be carried out without conferring upon her the power of granting mining leases to extend beyond the term of her life: and he referred to the following authorities: *Campbell* v. *Leach* (5); 2 Sugden on Powers, 6th ed. 327; *Shannon* v. *Bradstreet* (6); *Berry* v. *White* (7); *Norway* v. *Rowe* (8); *Sheehy* v. *Lord Mus-*

(1) Cro. Eliz. 678, 734.
(2) 6 Q. B. 208.
(3) 5 B. & Ad. 298.
(4) 12 Ad. & E. 356; 4 P. & D. 114.
(5) Ambler, 740.
(6) 1 Sch. & Lef. at p. 61.
(7) Bridg. 82.
(8) 19 Ves. 144.

kerry (1); *Attorney General* v. *Moses* (2); *Hele* v. *Greene* (3); *Doe* d. *Keen* v. *Walbank* (4); *Doe* d. *White* v. *Simpson* (5); *Ackland* v. *Lutley* (6); and *Ferrand* v. *Wilson.* (7) He further contended that the power was well exercised by the lease in question; referring to *Morris* v. *Rhydydefed Colliery Company* (8); *Williams* v. *Hayward* (9); 2 Sugden on Powers, 6th ed. 80; *Cobbould* v. *Marshall* (10); and *Alexander* v. *Alexander.* (11)

Mellish, Q.C., in reply, cited *Dand* v. *Kingscote* (12), *Cardigan* v. *Armitage* (13), *Doe* d. *Brune* v. *Prideaux* (14), and *Doe* d. *Keen* v. *Walbank.* (4)

Cur. adv. vult.

KELLY, C.B. (Feb. 6, 1867), delivered the judgment of the Court:—

The question in this case turns upon the effect of the will of Leonard Bilson Gwyn, of Glyn Abbey, in the county of Carmarthen, made in the year 1798, and of a power to work and deal with certain mines and minerals granted by that will, and exercised or purporting to be exercised by Catherine Middleton Gwyn, the daughter of the testator.

By the will certain real estates are devised by the testator to his daughter for life, with power to her to appoint them by will to certain persons, relatives of the testator, and the heirs of their bodies respectively, and, in default of such appointment, to other relatives in tail male in succession; with an ultimate remainder to the testator's right heirs. The will directs that all persons becoming entitled to estates under it shall take and bear the name and arms of Gwyn. And a power is conferred upon the daughter to make a settlement, under certain circumstances, upon any husband with whom she may intermarry. There is then a power to

(1) 1 Sug. Pow. 6th ed. 548; 1 H. L. C. 576.
(2) 2 Madd. 294.
(3) 2 Roll. Abr. 261; Powers, A. pl. 10.
(4) 2 B. & Ad. 554.
(5) 5 East, 162.
(6) 9 Ad. & E. 879.
(7) 4 Hare, 344.
(8) 3 H. & N. 473; 27 L. J. (Ex.) 480: in error, 3 H. & N. 885; 28 L. J. (Ex.) 119, 5 Jur. N. S. 239.
(9) 1 E. & E. 1040.
(10) 7 B. P. C. 111.
(11) 2 Ves. Sen. 640.
(12) 6 M. & W. 174.
(13) 2 B. & C. 197; 3 D. & R. 414.
(14) 10 East, 158.

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the daughter and all other persons who may become possessed of the estates under the limitations of the will to grant leases of any of the real estates not appropriated to the payment of debts, for the term of twenty-one years, reserving the best improved rent, and also to contain a special reservation impowering the daughter during her life, and such other persons as may become entitled to the real estates after her decease, and their assigns, labourers, and workmen, to search for and take coal, iron-ore, and other minerals from the mines under the lands leased. There is then a provision that neither the daughter nor any one taking under the limitations of the will shall cut down any wood or timber until the expiration of twenty years. And then comes the power to the daughter upon which the question in this case arises, to work or contract for, lease, or set out to be worked, the coal and other minerals in the mines, with a direction that the issues, proceeds, and profits arising therefrom shall be applied by the daughter, with the assent of the trustees, in the purchase of real estates in certain parishes named in the county of Carmarthen, and that the interest of the moneys thus arising before investment shall likewise be applied in the purchase of real estates.

Upon the death of the testator, the daughter entered into possession; and, during the continuance of her life-estate, assuming to exercise the power in question, she granted to one Joseph Martin, of whom the defendant is the assignee, a lease of mines and minerals for twenty-one years, or, if she had the power to do so, for sixty years, from the 25th of March, 1840.

The daughter died on the 6th of December, 1840; and the plaintiff, Thomas G. L. C. Powell, having become tenant in tail under the limitation of the will, and having attained his age of twenty-one on the 9th of February, 1846, claims to be entitled to the possession of the mines and minerals leased by the daughter to Martin, on the ground that the lease could take effect, if at all, only during the life of the daughter, and is therefore now at an end: and the question is, whether the daughter, under the power contained in the will, was enabled to grant a valid lease of the mines for sixty years, or for any longer term than during her own life.

In order to put a right construction upon the power contained in

this will, it is agreed that the Court shall consider the general intent of the testator, to be collected from the whole will. On looking to its general provisions, we find that he manifestly intended to enhance the value and substance of the inheritance at the expense of his daughter, the tenant for life: for, although the tenant for life is in terms without impeachment of waste, he expressly directs that timber is to be uncut for twenty years after his death, and that his daughter shall apply whatever rents and profits she may derive from the mines during her life in the purchase of lands which are to pass to those in remainder under the limitations of the will.

It next becomes necessary to look to the language of the testator in the creation of the power itself, and to ascertain his intention by considering the true meaning of the language which he has used, giving to it its natural signification according to the ordinary rules of interpretation; giving effect, if possible, to every part of the clause; and, if any part of it be ambiguous, interpreting it by reference to the context, to the general intent of the will, and, if necessary, to the surrounding circumstances.

Now, the words are these. After directing that the timber shall remain uncut for the period of twenty years, the will proceeds,—"And that it shall and may be lawful for my said daughter to work, lease, or set out to be worked and wrought, all the coal, culm, and other minerals under my estate." In considering the question whether by these words the testator intended to confer a power upon his daughter to grant a lease for an indefinite time, it might be of sixty, or one hundred, or a thousand years,—a lease which would bind the inheritance in the hands of the future owners of the estate; and seeing the loose and vague language in which the testator has expressed himself, we cannot but observe that in the same will, and almost in the same page of the will, he had created a power to the successive tenants in possession to grant leases of portions of the property for twenty-one years, with certain restrictions, conditions, and reservations, all expressed in apt and technically correct terms: and we are naturally led to the inference that, if he really intended to confer a leasing power of this extensive and important character, he would have expressed himself in equally appropriate and unambiguous language.

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But we must next consider the words which he has used in the operative part of the power. These words are,—"It shall be lawful for my said daughter to work or contract for, lease, or set out to be worked or wrought, all the coal, &c., in the mines." We cannot but think that the maxim noscitur à sociis applies to this part of the power, and that, considering it also with reference to what immediately precedes and immediately follows, it means no more than that the tenant for life should be at liberty to work the mines herself, or to contract with another for working them, and that that contract might be the letting and setting out of the mines to be worked, which might not incorrectly be described as a lease or a leasing of the mines; but that no more was intended than the working of the mines by herself or an agent, or tenant, or other contracting party, for her personal benefit; and that, if so important a power had been intended to be conferred as that of granting a lease for a long term of years, and so directly affecting the interests of the future owners of the estates for a long time to come, apt and formal words would have been used by the testator, as in the creation of the power to grant leases for twenty-one years of the surface of the lands.

But we must now attentively consider the entire language and effect of the clause itself:—"I do hereby order and direct that it shall and may be lawful for my said daughter to work or contract for, lease, or set out to be worked and wrought, all the coal, culm, and other minerals whatsoever which are already known and discovered, or which may be hereafter found out and discovered, in or under such of my real estates as are not specifically hereinbefore devised for the payment of my debts, legacies, and funeral expenses; and that all the issues and net proceeds and profits arising therefrom shall from time to time as the same shall arise be paid over by my said daughter to my said trustees and their heirs, and by them in the first place applied in payment of any of my debts in case the personal and real estates hereinbefore devised toward payment of debts should happen to prove insufficient; and, after payment of the whole thereof, that my said daughter should, by and with the consent of my said trustees, punctually as occasion and opportunity shall offer, lay out the same in the purchase of real estates in the several parishes of Llanon and Llangendeirne,

and certain other parishes in the county of Carmarthen. And it is my intent and meaning that such purchased premises should be conveyed and settled to the same uses, upon the same trusts, and subjected to like limitations, reservations, and conditions in all respects as my said real estates not specifically bequeathed for the payment of my debts; and that the rents and profits of such purchased premises, when and as often as the same shall happen to become due, from the date of such purchase or purchases as aforesaid, shall be received by my said daughter in the same manner as the rents and profits of my said real estate are directed to be paid to and received by her, for the term of her natural life; and that the interest of such moneys as shall arise from the working of such collieries, iron-ore, or any other ore, mines, and minerals whatsoever, shall, until such purchase be made, be laid out at interest and added to the principal for to be applied in the purchase of such real estates."

Upon carefully considering the language of this clause creating the power in question, we are of opinion that, upon every principle of law applicable to the construction of written instruments, it is impossible otherwise to construe this power than by limiting the operation of its exercise to the life of the daughter of the testator.

It is impossible to give effect to this provision, substantially or literally, but by the application of the whole of the issues, proceeds, and profits which shall be derived from any lease granted under it in the purchase of land, and by such application being the act of the daughter herself. Is it possible, then, to fulfil these directions, or to give effect to this part of the will at all, upon the construction contended for on the part of the defendant? Or, in other words, can the daughter pay the issues and profits derived from the lease to be invested in land, if the lease be for sixty years or for a single year beyond the continuance of her own life? The language of the testator is, "all the issues and net profits arising *therefrom* shall be applied in the purchase of lands;" that is, all the issues and profits arising from the lease to be granted. How can that be done, if, as is admitted for the defendant, the issues and profits are to be so applied only during the life of the daughter, and afterwards to the use of the tenants in remainder?

It is necessary, then, in order to read the whole according to the

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construction contended for by the defendant, to alter the entire structure of the sentence, and read it as a power to lease the mines, and to apply so much of the issues, proceeds, and profits arising therefrom as shall accrue due and be received during the life of the daughter, by the hands of the daughter herself, to the purpose in question; and, after her death, to apply them, not in the purchase of land, as expressly directed by the will, but to the use of the several persons in succession who shall take under the limitations of the will. It must also be observed, that, if this power enabled the tenant for life to grant leases of the mines of indefinite duration, it is directly inconsistent with the conditions imposed upon the granting of leases of the surface, that a right shall be reserved to the lessors (the successive owners of the property) to work the mines and take the minerals thereunder. Of what avail is such a reservation to any tenant of the estates after the daughter, the first taker, if she has leased the whole of the mines for one hundred years or more?

We are, therefore, all of opinion that the daughter had no power to grant a lease beyond the term of her own life, and that the lease in question expired at her death.

Being of this opinion, it is unnecessary to consider the objections made to the lease on the ground that it authorizes the lessee of the mines to prejudice the inheritance by burdening the surface lands with roads and railways and engines and houses, for the purpose of trafficking in other minerals, working other mines, and accommodating and benefiting other persons than such as were in any way connected with the lease or the estate. But we must not be supposed to acquiesce in the doctrine that these objections if sustained would avoid this lease in part, and leave it valid for the residue. We have, therefore, only to decide that the judgment of the Court of Common Pleas must be reversed, and the rule made absolute to enter a verdict for the plaintiff.

Judgment reversed.

Attorney for plaintiff: *J. Lote, for Darvill & Co., Windsor.*
Attorney for defendant: *W. M. Hacon.*

AZÉMAR *v.* CASELLA AND ANOTHER. *Feb.* 9.

Mercantile Contract, Construction of—Condition—Sale of Cotton "to arrive," guaranteed equal to Sample—Allowance to be made for Inferiority of Quality *—Bulk tendered of a different* Kind.

6 Q.B. 601

The defendants, through a broker, bought of the plaintiff "the following cotton, viz. $\frac{D.\ C.}{C.}$ 128 bales, at 25*d.* per lb., expected to arrive in London per *Cheviot* from Madras. The cotton guaranteed equal to sealed sample in our (the brokers') possession. Should the quality prove inferior to the guarantee, a fair allowance to be made." The sample was of "Long-staple Salem" cotton. The 128 bales marked $\frac{D.\ C.}{C.}$ which arrived by the *Cheviot* contained "Western Madras" cotton. Upon a special case, in which it was stated that "the cotton was therefore not in accordance with the sample; that Western Madras cotton is inferior to Long-staple Salem, and requires machinery for its manufacture different to that which is used for Long-staple Salem; and that the market-price of Western Madras was at the date of the contract only 23*d.* per lb.:"—

Held, that the cotton tendered was not that which the defendants bargained for, and that they were not bound to accept it; for, that the allowance clause had reference only to inferiority of *quality*, and not to difference of *kind*.

Affd in Ex Ch post

ACTION to recover damages for breach by the defendants of a contract for the purchase of 128 bales of cotton. The action was commenced on the 21st of November, 1864; and the first count of the declaration contained breaches for not accepting and paying for the cotton, and for not referring to arbitration a dispute as to the allowance to be made by reason of the quality of the cotton being inferior to guarantee. The declaration also contained the common money counts.

The defendants pleaded, to the first count,—first, a denial of the contract,—secondly, a denial of the arrival of the cotton,—thirdly, that the cotton was not equal to sealed sample,—fourthly, a denial of the plaintiff's readiness and willingness to perform the contract,—fifthly, as to the first breach, after setting out the contract, that the sample therein referred to was a sample of cotton of a particular kind and description, and that it was a condition of the contract that the cotton should be of that kind and description, but that, in fact, it was of a wholly different kind and description,—sixthly, as to the second breach, a denial of the dispute having arisen,—seventhly, as to the second breach, that a dispute also arose as to whether the defendants were bound to

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accept the cotton, and that the plaintiff refused to refer the same, in consequence of which the defendants refused to refer the dispute as to the allowance,—eighthly, to the money counts, never indebted.

The plaintiff took issue upon all the pleas, and also demurred to the third, fifth, and seventh pleas. (1)

At the trial before Erle, C.J., at the sittings in London after Hilary Term, 1865, a verdict was found for the plaintiff, subject to the opinion of the Court upon the following special case:—

1. The plaintiff is a merchant carrying on business in Mark Lane, London, under the firm of J. C. Azémar & Co., and the defendants are merchants in Lime Street, London, trading under the firm of A. Casella & Co.

2. In the summer of 1864, Messrs. De Souza & Co., correspondents of the plaintiff at Madras, shipped on board the *Cheviot*, under a bill of lading describing 201 bales, 128 bales of cotton, marked $\frac{D.C.}{C.}$, being the only bales with such mark on board the *Cheviot*. Neither the bill of lading nor the fact of there being no other cotton of the same mark on board the ship, was at any time made known to the defendants. De Souza & Co. consigned the cotton to the plaintiff, and they duly advised him of such consignment. They also sent him a sample of cotton by the overland mail. Such sample was a sample of a kind of cotton known in the London market as "Long-staple Salem cotton of fine quality." The sample was in a paper which was marked on the outside "$\frac{D.C.}{C.}$ 128 bales Western cotton, per *Cheviot*." Upon receipt of the sample, the plaintiff took it in the said paper to Barber & Co., London cotton-brokers, and had a conversation with Barber. This conversation was given in evidence by Barber upon cross-examination by the defendants' counsel. The plaintiff asked Barber whether he could sell that cotton "to arrive," and what it was worth, and what sort of cotton he thought it was. Barber said it seemed to him to be "Long-staple Salem." He pointed out to the plaintiff that it was described on the outside as "Western," but repeated that in his opinion it was "Long-staple Salem," and that, if then on the spot, it would be worth 25*d.* per lb. Barber

(1) A copy of the pleadings was annexed to the special case, and it was agreed that the demurrers should be argued with it.

asked the plaintiff what he would guarantee. The plaintiff answered he would guarantee the sample, and nothing else. Shortly afterwards the defendants saw Barber at Barber's office, and had with him the following conversation. This conversation was not made known to the plaintiff, nor were the communications between the defendants and their correspondents made known to the plaintiff. The plaintiff's counsel objected to any evidence of the same respectively being given. The evidence was, therefore, set forth, subject to the opinion of the Court whether it could properly be received. If the Court is of opinion that it should be received, then it is to be taken as part of the case; otherwise not. The defendants told Barber that they were in want of some Long-staple Salem cotton for correspondents. Barber answered that he thought he had some cotton "to arrive" which would suit them. Barber then shewed them the above-mentioned sample, still in the above-mentioned paper. Neither Barber nor the defendants took notice of the writing on the paper. Barber told the defendants that he would sell them the cotton to arrive, guaranteed equal to sample; but that the sellers would not sell otherwise than by sample, and would guarantee nothing but the sample. The defendants examined the sample, and asked Barber what cotton he called it. Barber answered that he considered it was Long-staple Salem. The defendants took a small portion of the sample, which they afterwards remitted to their correspondents at Augsburg, with a letter containing the following request:—"Telegraphiez si nous devons acheter 128 Salem, per *Cheviot,* parti 2 Juin. Echantillon, qui est de longue soie, garanti à 25¼*d.*"

3. In answer to this letter, the defendants received the following telegram:—"Accept 128 bales Salem, guaranteed long-staple, shipped 2nd June, 25¼*d.* If possible, 25*d.* Do for the best." On receipt of this telegram, the defendants saw Barber and offered him 25*d.* per lb. for the 128 bales. Barber agreed to sell at that price, and again stated that the sellers had an objection to put into the contract that the cotton was "Long-staple Salem," or even that it was "Salem." The defendants then asked for the seller's name. Barber said that Azémar was the seller, that he was not in the cotton trade, and did not understand cotton, and that was the reason why he made such objection. The defendants then said

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that they knew Azémar was respectable; and asked, "Would he guarantee the cotton to be equal to the sample?" Barber replied "Yes."

4. Barber & Co. thereupon made the following contract, in which the words not underlined were in print, and the words underlined were filled up in writing:—

"Certified London Contract.

"London, 15 *July*, 1865.

"*Sold* by order and for account of *Messrs. J. C. Azémar & Co. to Messrs. A. Casella & Co.* the following cotton, viz. $\frac{\text{D. C.}}{\text{C.}}$ 128 *bales at* 25*d. per lb.* expected to arrive in London, per *Cheviot*, from *Madras*. The cotton guaranteed *equal to sealed sample in our possession*. Should the quality prove inferior to the guarantee, a fair allowance to be made. Any slight variation in marks not to vitiate this contract. The cotton to be warehoused at seller's expense in one of the public docks or customary wharves. The buyer to pay a deposit of 12*l*. per bale (to be returned in the event of loss by fire) on the second Saturday after the final day of landing, in exchange for dock or wharf weight-notes, and the remainder of the purchase-money at the expiration of the usual three months' prompt, or on delivery of the warrants; interest being allowed at the rate of 5 per cent. per annum for prepayment. The first and second-class sea-damaged bales (if any) to be made merchantable, and taken at $\frac{1}{8}$ per lb. less than the sound. The third and fourth-class sea-damaged bales (if any) to be taken at a fair allowance. The cotton after landing to be at the risk of the seller (only to the amount of this contract value) until the prompt-day or delivery of the warrants or orders of delivery, whichever may first happen. Should the cotton, or any portion thereof, not arrive by the above-named vessel, from loss of vessel or other unavoidable cause, this contract for such portion to be void: *but, should the cotton be transhipped and arrive in London by other vessels, this contract still to hold good.* In the event of any dispute arising out of this contract, the matter to be referred to two disinterested London cotton-brokers for arbitration, buyer and seller each nominating one.

"Brokerage, $\frac{1}{2}$ per cent. *Guarantee, $\frac{1}{2}$ per cent.*"

5. This printed form was at the time in question a form commonly used in the London market, and known as "The Certified London Contract." A common mode in the ordinary course of business of filling up the form is, to fill up the blank after the words "the following cotton, viz." thus,—"128 bales $^{D.C.}_{C.}$, at 25*d.* per lb.," and the blank after the words "the cotton guaranteed," thus,—"Fair Bengal," or "Good fair Tinnivelly." Sometimes the blanks will be filled up thus,—the first, "128 bales Bengal," and the second, "fair," or "good fair," or "fine."

6. If the sale is a sale by sample, then the second blank is filled up, as in the present contract, with the words, "equal to sample in our possession." At the time of the making of the said contract, and for some time previous, various kinds of cotton coming from different districts and countries had been imported into London, and were bought and sold in the London market. There were different cottons known on the market, and bought and sold under the following names:—There were "Surat cottons," divided into Saw-ginned, Broach, Oomrawuttee, Dhollerah, Mangarole, and Comptah. There were "Madras cottons," divided into Tinnivelly, Northern and Western Coconada, and Coumlatore and Salem. There were Scinde cotton, Bengal and Rangoon cotton, China, Japan, West Indian, Brazilian, Smyrna, and Greek and Sea Island cottons. Each and every of these different denominations or divisions is compared with a standard sample. There is a standard sample kept of each of these different denominations or divisions. Each kind when so compared is then divided into different divisions under the terms "ordinary," "low middling," "middling," "fair," "good fair," "fine," &c. The different denominations or divisions first above-mentioned, are quoted and sold at different prices on the same day; and the different divisions secondly above-mentioned are sold at different prices on the same day. On the same day, cotton quoted as for example "Western Madras," and "Middling," or as "Middling Western Madras," may be of higher price than "Good fair Scinde;" but "Fair Western Madras," would on the same day be always of higher price than "Middling Western Madras."

7. The defendants after the making of the above contract, without the knowledge of the plaintiff, made out contracts to corre-

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spondents of theirs for the sale to them of 64 bales of cotton on the same terms and at the same price as contained in the contract signed by Messrs. Barber & Co., with the exception that no marks were given; and they made out a similar contract for the other 64 bales to another correspondent of theirs, the defendants being entitled to a commission from their correspondents on the contracts being fulfilled.

8. The *Cheviot* arrived in London on the 14th of October, 1864, having on board several thousand bales of cotton, and amongst them the 128 bales shipped by De Souza, as already mentioned, which were the only bales marked $\frac{D.C.}{C.}$ The 128 bales were landed and warehoused by the plaintiff at Cotton's and Depôt Wharf, and weight-notes made out by the wharfingers in the ordinary way. The cotton had been previously examined by the wharfingers, for the purpose of ascertaining which of the bales (if any) were sea-damaged, and of classifying same, and for the purpose of making them merchantable where necessary and possible. This is done by removing the damaged portion of the bales; the portions so removed not being taken by the buyer, but remaining the property of the importer, and being sold for his account. Any of the bales which on such examination by the wharfingers turn out not to come up to the classification of third or fourth class sea-damaged, are altogether rejected from the parcel, and are not taken by the buyer, but remain the property of the importer, and are afterwards sold for his account. None of the 128 bales in question contained any damaged cotton. The landing of the cotton was completed on Wednesday, the 26th of October, 1864; and the deposit, amounting to 1536*l.*, would have become payable on Saturday, the 5th of November, 1864, and the prompt would have expired on the 28th of January, 1865. The wharfinger drew samples from the bulk in the ordinary way, which were shewn to the defendants by Barber & Co. The defendants upon seeing the bulk samples, at once stated to Barber & Co. that they claimed to reject the cotton, on the ground that it was not Long-staple Salem cotton, and that they required an arbitration on that point. *The cotton was not "Long-staple Salem," but was a particularly good sample of Western Madras. The cotton was therefore not in accordance with the sample.* Western Madras cotton is inferior to Long-staple

Salem, and requires machinery for its manufacture different to that which is used for Long-staple Salem; and the market price of Western Madras was at the date of the contract only 23*d.* per lb.

9. The defendants' correspondents have refused to accept the cotton by the *Cheviot* in fulfilment of the defendants' sale to them, on the ground that it was not Long-staple Salem, and that they could not employ it for the manufacturing purpose for which they had bought it; and the defendants have lost their commission, amounting to 80*l.* 12*s.* 3*d.*

10. The plaintiff having, on the 21st of October, 1864, received an intimation from Barber & Co. that, "in consequence of the samples of 128 bales of cotton per *Cheviot* sold by him on the 15th of July turning out different from the contract guarantee, the buyers had given notice that they threw up the contract," a correspondence ensued between the parties, — the plaintiff requiring that the arbitration should be confined to the allowance to be made, and the defendants insisting that the arbitrators should determine whether or not the buyers were entitled to reject the cotton on the ground that the bulk did not agree with the sample.

11. The arbitrators never agreed together upon any question with regard to the contract, and made no further attempt to meet; and the arbitration went off.

12. At the trial it was arranged that the same brokers should be appointed on each side as before (with power to appoint an umpire), to determine what was the fair allowance to be made (if any) if the bulk was not equal to the sample, having regard to the time of arrival. The brokers met, and disagreed, and appointed an umpire, who decided that the difference in value between the bulk and the sale sample was 3*d.* per lb.

13. The weights to be delivered of the 128 bales would have been 38,700 lbs.

14. On the 21st of October, 1864, the market-price of such cotton as was contained in the 128 bales was 15½*d.* per lb. On the 5th of November, 1864, it was 16½*d.* per lb. On the 28th of January, 1865, it was 17½*d.* per lb. On the 9th of March, 1865, the day on which the cotton was actually sold, the market-price was 13½*d.* per lb.

15. Interest on the amount of deposit from the date when the

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deposit would have been payable if no dispute had occurred up to the trial, would be 23*l.* 7*s.* 6*d.*

16. The Court was to be at liberty to draw any inferences of fact in the same way as a jury would be entitled to do.

The question for the opinion of the Court was, whether the plaintiff was, under the circumstances of the case, entitled to maintain the action. If the Court should be of opinion in the affirmative, the verdict and judgment were to be entered for the plaintiff for such sum as the Court might direct. If in the negative, then for the defendants,—the different issues to be entered for plaintiff or defendants, according to the opinion the Court might entertain thereon.

Sir G. Honyman, Q.C. (with him *M'Leod*), for the plaintiff. The 128 bales of cotton which arrived by the *Cheviot*, and which the plaintiff was ready to deliver, were a compliance with the contract of the 15th of July, 1864; and the guarantee that the cotton was equal to sample does not amount to a condition, but the defendants were bound to accept it subject to a reduction to be settled by arbitrators. The contract was for the sale of the specific 128 bales on board the *Cheviot*, marked $\frac{D.\,C.}{C.}$, with a collateral warranty that the bulk should be equal to the sample. *Parsons* v. *Sexton* (1), and *Dawson* v. *Collis* (2), are expressly in point to shew that by such a contract the property passes to the vendee. And, assuming that the property did not pass, this was a mere collateral warranty, the breach of which will not avoid the contract, but merely give the buyer a remedy by cross-action or by reduction of price, according to the principles laid down by Lord Abinger, C.B., in *Chanter* v. *Hopkins* (3), and by Erle, C.J., in *Bannerman* v. *White.* (4) And see the elaborate judgment of Williams, J., in *Behn* v. *Burness.* (5) Applying those principles to the facts which appear upon this special case, it is clear that the stipulation that the cotton should be equal to the sample referred to, is not a condition, but a collateral engagement only, which may give rise to a cross-action, or may entitle the vendee to

(1) 4 C. B. 899; 16 L. J. (C.P.) 181.
(2) 10 C. B. 523; 20 L. J. (C. P.) 116.
(3) 4 M. & W. 399, 404.
(4) 10 C. B. (N.S.) 844; 31 L. J. (C.P.) 28.
(5) 3 B. & S. 751; 32 L. J. (Q.B.) 204.

a reduction of price. But, if the *Cheviot* arrived with any sort of cotton marked $\frac{\text{D. C.}}{\text{C.}}$, answering the description of that contracted for, and coming from Madras, the defendants were bound to accept it.

[WILLES, J. The question is, whether "quality" includes "sort" or "kind." According to your argument, if I contract for wine to be shipped from Bordeaux warranted equal to sample, and, the sample being Chateau d'Yquem, the bulk when tendered proves an inferior Medoc, I am bound to accept it.]

Two different constructions can hardly be given to the same word in the same sentence. If this is not a condition as to quality, neither can it be a condition as to the kind of cotton. The case finds that this was Western Madras cotton.

J. Brown, Q.C. (with him *Hawkins, Q.C.*, and *Hannen*), for the defendants. This was a contract for the sale of a kind of cotton known in the London market as "Long-staple Salem," and the bulk being of a different kind, viz. a kind known as "Western Madras," the defendants were not bound to accept it. If authority were needed to shew that the property in the goods does not pass upon a contract of this description, the case of *Logan* v. *Le Mesurier* (1) is in point. Looking at the terms and nature of this contract, and at the purpose for which the cotton was contracted to be bought, it is clear that the warranty amounts to a condition. The only question is, whether the allowance clause makes any difference in this respect. It is submitted that it does not, but that it applies to inferiority of quality only, and not to difference of kind. "Equal to sample, &c.," here means "of the same kind and quality as the sample." The cotton being at sea, the buyer had no opportunity for inspection; the case, therefore, differs materially from those where the contract has been for the sale of a specific article which the buyer might examine. The facts stated in the special case shew that the plaintiff is seeking to put upon the defendants an article which is substantially different from that which they contracted to buy.

[WILLES, J. In *Syers* v. *Jonas* (2), Parke, B., speaking of the usage in the tobacco trade, that all sales are by sample although not so expressed in the bought and sold-notes, says: "This undoubtedly amounts to a parol warranty or agreement that the bulk

(1) 6 Moore P. C. 116. (2) 2 Exch. 111, 117.

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should correspond with the sample. If the goods have not been delivered, or the property has not passed by the bargain (a question depending upon the terms of the bargain for a specific chattel), this agreement authorizes the purchaser to refuse to receive the article sold, or complete the bargain. If he does receive it, or the property does pass, he may sue on the agreement, or give it in evidence in mitigation of damages, according to the authority of *Street* v. *Blay*." (1)]

What will justify a refusal to accept is now well settled. In *Behn* v. *Burness* (2), the rule is thus summed up,—"With respect to statements in a contract descriptive of the subject-matter of it, or of some material incident thereof, the true doctrine established by principle as well as authority appears to be, generally speaking, that, if such descriptive statement *was intended to be a substantive part of the contract*, it is to be regarded as a warranty, that is to say, a condition on the failure or non-performance of which the other party may, if he is so minded, repudiate the contract in toto, and so be relieved from performing his part of it, provided it has not been partially executed in his favour." And, after referring to several cases, the learned judge goes on,—"Accordingly, if a specific thing has been sold, with a warranty of its quality, under such circumstances that the property passes by the sale, the vendee, having been thus benefited by the partial execution of the contract, and become the proprietor of the thing sold, cannot treat the failure of the warranty as a condition broken (unless there is a special stipulation to that effect in the contract; see *Bannerman* v. *White* (3)); but must have recourse to an action for damages in respect of the breach of warranty. But, in cases where the thing sold is not specific, and the property has not passed by the sale, the vendee may refuse to receive the thing proffered to him in performance of the contract, on the ground that it does not correspond with the descriptive statement, or, in other words, that the condition expressed in the contract has not been performed." The rule is similarly laid down in the notes to *Cutter* v. *Powell*. (4) Then, the allowance clause provides only

(1) 2 B. & Ad. 456.

(2) 3 B. & S. 751, 755; 32 L. J. (Q.B.) 204, 206.

(3) 10 C. B. (N.S.) 844; 31 L. J. (C.P.) 28.

(4) 2 Smith L. C. 1, 27 et seq. 6th ed.

for inferiority of quality, and not for difference of kind. This is well illustrated by a reference to the rules which govern in the construction of compensation clauses in contracts for the sale of real property. These will be found in Dart's Vendors, pp. 86 et seq., 3rd ed. In *Nichol* v. *Godts* (1), Parke, B., takes this distinction,—"The evidence went to shew that the oil offered did not answer the description of the article sold, and the jury so found. The warranty affects only the *quality*, but not the *nature* of the article itself." In *Wieler* v. *Schilizzi* (2), it was held that, even upon a sale not by sample, and without express warranty, of merchandize which the buyer has no opportunity of inspecting, it is an implied condition that the article shall fairly and reasonably answer the description in the contract. *Josling* v. *Kingsford* (3) is a remarkable instance of the distinction between quality and kind. It was there held that a contract for the sale of "oxalic acid" was not complied with by the delivery of an article which the jury found did not, in commercial language, come properly within the description of "oxalic acid," even though the seller was not the manufacturer of the article, and at the time of contracting expressly declined all responsibility as to the *quality*, and the buyer had had an opportunity of inspecting it. In giving judgment, Williams, J., says: "We are all of opinion that, however completely the defendant may have guarded himself against contracting that the thing was of any particular quality, it is not possible to construe the contract in any other way than that it was a part of the agreement that the subject of the sale should be the oxalic acid of commerce." Erle, C.J., in delivering the judgment of the Court in *Bannerman* v. *White* (4), says: "This undertaking [viz. that no sulphur had been used in the cultivation of the hops] was a preliminary stipulation; and, if it had not been given, the defendants would not have gone on with the treaty which resulted in the sale. In this sense, it was the condition upon which the defendants contracted; and it would be contrary to the intention expressed by this stipulation that the contract should remain valid if sulphur had been used." All the cases, including *Gompertz* v.

(1) 10 Exch. 191; 23 L. J. (Ex.) 314.

(2) 17 C. B. 619.

(3) 13 C. B. (N.S.) 447; 32 L. J. (C.C.) 94, 9 Jur. N.S. 947

(4) 10 C. B. (N.S.) 844, 860; 31 L. J. (C.P.) 28, 32, 8 Jur. N.S. 282, 284

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Bartlett (1), seem to take a distinction between a different kind and a different quality of the same kind.

Sir G. Honyman, Q.C., in reply. The question is one of mere construction. The contract was for the sale of a specific parcel of cotton, described by certain marks, coming from Madras by a particular ship. The conversations as to the object for which the defendants bought the cotton, an object not communicated to the seller, can have no bearing on the question. The cases cited on the other side are all distinguishable. In *Nicol* v. *Godts* (2), the subject of sale was rape-oil; and the jury found that the article delivered was not rape-oil. So, in *Wieler* v. *Schilizzi* (3), and *Josling* v. *Kingsford* (4), the articles tendered were not what were contracted for. And in *Bannerman* v. *White* (5), all that was decided was, that there was evidence from which the jury might infer that the hops were purchased subject to a condition. The question here is, was this a sale of specific bales of cotton, with a warranty superadded that it should be equal in quality to the sample? or, was it a sale subject to a condition that it should be Long-staple Salem? It is submitted that the contract cannot bear the latter construction, because of the stipulation for allowance in the event of the cotton proving to be inferior to the guarantee.

WILLES, J. I am of opinion that the defendants are entitled to judgment. The action is brought upon a contract for the purchase of cotton to arrive by the *Cheviot*, from Madras, and guaranteed equal to sealed sample in the possession of the sellers' brokers. Upon the arrival of the cotton, it was rejected by the purchaser, on the ground that it was not in accordance with the sample referred to in the contract; and an arbitration was suggested by the seller, to be limited to the question whether the quality equalled the sample; but the defendants insisted that there was another question to be determined, viz. whether the cotton tendered was the thing bought by them; and consequently the attempt to arbitrate failed. It is obvious to my mind that the defendants are

(1) 2 E. & B. 849; 23 L. J. (Q.B.) 65.
(2) 10 Exch. 191; 23 L. J. (Ex.) 314.
(3) 17 C. B. 619.
(4) 13 C. B. (N.S.) 447; 32 L. J. (C.P.) 94.
(5) 10 C. B. (N.S.) 844; 31 L. J. (C.P.) 28.

not answerable for the failure of the arbitration; and indeed it was not insisted for the plaintiff that there could be any recovery for the second breach. The defendants clearly were not bound to refer less than the whole dispute. The sole question to be decided, is, whether the defendants were right in their ground of rejection, viz. that the 128 bales by the *Cheviot* were not the cotton they contracted to receive and to pay for. Whether they were right in that contention, or the plaintiff right in saying that the defendants were bound to receive that cotton subject to an allowance for any inferiority of quality, must depend upon the terms of the contract itself. That was a contract by which Messrs. Barber, acting as brokers for both parties, bought for the defendants of the plaintiff 128 bales of cotton, marked $\frac{\text{D. C.}}{\text{C.}}$, expected to arrive in London per *Cheviot* from Madras, at 25*d.* per lb. If it had stopped there, it would have been, as was insisted by Sir George Honyman, a bargain for the purchase of 128 bales of cotton arriving with a particular mark in London from Madras. The description would extend to cotton generally coming so marked from Madras on board the ship named. The contract, however, goes on, "The cotton guaranteed equal to sealed sample in our possession." There we have for the first time a complete description of what the parties are bargaining about. Messrs. Barber, the brokers who signed for both sides, had in their hands a sample with reference to which the bargain was made. That, when looked at, turns out to be a sample of "Long-staple Salem cotton;" and we must therefore take it that the defendants bargained for "Long-staple Salem cotton." Then come the words,—"Should the *quality* prove inferior to the guarantee, a fair allowance to be made." The subsequent parts of the contract are clear to shew that the property in the cotton was not meant to vest in the buyers by the bargain alone. If it had been otherwise, there would have been considerable plausibility in the argument of Sir George Honyman, that, this being a sale of specific cotton, the property passed, and the defendants would have to resort to a cross-action in respect of any breach of the collateral warranty. It seems to me, however, that the contrary construction is the correct one, and that the property in the cotton did not pass by the contract. There was no delivery and no acceptance. The only questions, therefore, which we have

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now to consider are,—first, whether the description "equal to sealed sample in our possession," refers to the species of cotton to which the sample belonged, and whether the cotton which arrived by the *Cheviot* answered that description; and, if so,—secondly, it would be necessary to refer to the subsequent clause in the contract, to see how far it affected the question whether species was in the contemplation of the parties; and, lastly, we have to make up our minds on the construction of the contract, regard being had to the facts of the case, and particularly to those stated in the eighth paragraph.

First, as to the question whether the contract was for cotton of a particular species, I cannot entertain a moment's doubt. I exclude the words "Should the quality prove inferior to the guarantee," because they refer to an allowance to be made in money in respect of the article being of less value than that represented by the sample. In terms they do not extend to enforce on the buyers the acceptance of an article different from that which they bought. I would add that I am not led to this conclusion by any supposed similarity between a case of this sort and the cases as to the purchase of lands; for, in truth, those cases have very little bearing upon the question: but I found my judgment upon this, apart from all the authorities, that the stipulation as to allowance being made for inferiority of *quality* does not relate to a difference in *kind*, affecting the identity of the article itself. That being so, let us see whether the contract was for the purchase of a specific sort of cotton, or applies to cotton in general. That depends upon the language of the guarantee clause, "The cotton guaranteed equal to sealed sample in our possession," which is to be construed by the facts existing at the time of the bargain, and by the surrounding circumstances so far as they are relevant to the dealings of the parties. Now, the first remarkable fact is the description of the sample itself; it was a sort of cotton well known, called Long-staple Salem cotton, which might have been expected to be shipped from Madras. What did the bulk consist of? and was it "Long-staple Salem cotton," or was it a thing of the same species as Long-staple Salem cotton, so that the parties must be taken to have intended that it should be taken in satisfaction of the contract? Now, as to this the case (par. 8) finds that "the cotton was not

Long-staple Salem, but was a particularly good sample of Western Madras: the cotton, therefore, was not in accordance with the sample." Was that a mere difference in value which could be compensated for under the allowance clause? or was it an essential difference in the species, so that the contract was for one thing, and the article tendered another? That seems to me to be determined by what follows in the case,—"Western Madras cotton is inferior to Long-staple Salem, and requires machinery for its manufacture different to that which is used for Long-staple Salem; and the market-price of Western Madras was at the date of the contract only 23*d.* per lb." Inferiority of quality and value might be compensated for by an allowance: but the question is whether difference of kind or species may be. I must own that it would have been more satisfactory to my mind to have had these questions disposed of by the verdict of a jury. In determining the question, it is impossible to exclude from one's mind the fact that, when a man bargains for Long-staple Salem cotton, and the seller offers him cotton of a totally different kind, and cotton which requires a different description of machinery for its manufacture, he is seeking to compel him to accept X. when he bargained for Y. The conclusion at which, upon the whole, I feel myself compelled to come, is, that, taking the contract and the sample together, what the defendants agreed to buy was 128 bales of the species of cotton contained in the sealed sample. The allowance was to be in respect of inferiority of *quality*, and not of difference of *kind;* and the defendants were not bound to accept with an allowance cotton of a description different from that which they bargained for. I am confirmed in this view by the absence of any statement in the case (which has evidently been drawn with great care) that the cotton in question was not such as might have been expected to be produced at Salem. It would no doubt have been so stated if it could have been. Then, taking up the opposite phase of the question, I find that, though the bulk was a particularly good sample of Western Madras, it was inferior in value to Long-staple Salem by $2\frac{1}{2}d.$ per lb. I should therefore infer that Western Madras did not come within the description of the cotton which was contained in the sample; and I come to the conclusion that the cotton tendered to the defendants was not that which they

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contracted to buy, and consequently that they are entitled to judgment.

MONTAGUE SMITH, J. I also am of opinion that the defendants are entitled to the judgment of the Court upon this special case. The question arises upon a contract which it is plain, on a fair reading of it, did not pass the property in the cotton. It was a contract for the sale of 128 bales of cotton of a particular mark, expected to arrive in London per *Cheviot* from Madras. If there had been no further terms contained in the contract, the plaintiff might have been entitled to recover. But one essential part of the contract was a stipulation in these words,—"The cotton guaranteed equal to sealed sample in our possession:" and the first question for our judgment is whether that is a condition, or merely a collateral agreement for the breach of which the defendants were to have a remedy by cross-action or a claim to a reduction of price. I am of opinion that it is a condition attached to the contract. In the ordinary case of a sale by sample, it is a condition of the contract that the bulk shall be equal to the sample. Here there is an express guarantee that the bulk shall be equal to the sealed sample. That clearly is a condition, for breach of which the defendants were entitled to disaffirm the bargain. But it is said that this absolute guarantee is qualified by what follows, and that upon the facts stated in the case the defendants were bound to take the cotton and the plaintiff to submit to an allowance. The question, therefore, turns upon the meaning of the words, "Should the quality prove inferior to the guarantee, a fair allowance to be made." Now, in order to ascertain whether the cotton which arrived per *Cheviot* was inferior to the sample, we must ascertain what the sample was and what the bulk was, and also what was the meaning of the parties when buying and selling by sample with a guarantee that the bulk shall be equal to the sample. As I understand the argument of Sir George Honyman, he would admit that, if the words "guaranteed Long-staple Salem cotton" had been written in the contract, that would have been matter of description, and the plaintiff would not have performed his contract by a tender of the 128 bales which did come home by the *Cheviot*. I think the contract ought to be read as if those

words had been inserted in it. The seller guarantees that the bulk shall be equal to the sample; and the sample is of Long-staple Salem cotton. Id certum est quod certum reddi potest. The question thus becomes partly one of law and partly one of fact. It is clear that, upon a contract so expressly worded, or, what is equivalent, referring to a sample, the purchaser would be entitled to have an article of the sort or kind thus described, treating the sample as part of the contract. Was the article tendered such? Upon the facts, as stated in the case, I think it was not. It appears that there is cotton of several different kinds, each varying in quality; and that the several kinds are distinct with reference to the only purpose for which cotton is ordinarily used, viz. to spin and to weave into cloth. The case finds that the cotton contained in the sample was of a different kind from the Western Madras which arrived, and which required machinery for its manufacture different to that which is used for Long-staple Salem. The article tendered, therefore, was essentially different in kind from the article contracted for. Suppose a contract were made for the sale of "one hundred casks of spirits" guaranteed to be equal to a sample produced, and with a stipulation for an allowance should the quality prove inferior to the guarantee, and, the sample being brandy, the bulk tendered were to consist of rum, could the allowance clause be applied to such a case? The standard of comparison would be wanting there, as here. Western Madras cotton, however good, never could have been equal to Long-staple Salem. It would be straining the meaning of the word "quality" to hold it to extend to a difference of kind. If the bulk here tendered varied only in quality from cotton of the same kind as that contracted for, the difference would be the subject of an allowance: but it never could have been intended that the seller should have power to substitute one kind of cotton for another. A distinction in kind is shewn here, and therefore the condition is not complied with, and the defendants are entitled to judgment. The count for not proceeding to a reference has been very properly given up. The defendants were willing to refer the whole matter; but the plaintiff insisted that the reference should be limited to the question of allowance for inferiority of quality. The result is that there will

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be judgment for the plaintiff on the third plea, and for the defendants as to the residue.

WILLES, J. My Brother Keating desired me to say that his view, so far as he was able to form one from the portion of the argument which he heard, coincides with that of the rest of the Court.

Judgment accordingly. (1)

Attorneys for plaintiff: *Thomas & Hollams.*
Attorney for defendants: *W. A. Crump.*

(1) The plaintiff brought error, and the case was argued in the Exchequer Chamber on the 21st of June, 1867, when the Court, without hearing counsel for the defendants, unanimously affirmed the judgment of the Court below. 2 W.R. 212

END OF HILARY TERM.

CASES

DETERMINED BY THE

COURT OF COMMON PLEAS

AND BY THE

COURT OF EXCHEQUER CHAMBER,

ON ERROR AND APPEAL FROM THE COURT OF COMMON PLEAS,

IN AND AFTER

EASTER TERM, XXX VICTORIA.

POULSUM *v.* THIRST.

1867
May 1.

Notice of Action—Metropolis Management Amendment Act (25 & 26 *Vict.* c. 102), *s.* 106—*Negligence of Contractor.*

The defendant, who was a contractor employed by the Metropolitan Board of Works to enlarge a sewer running into a tidal creek, erected a dam in the sewer, the water above which was removed by pumping. Owing to his negligence in not working the pumps, the sewage flowed back into the plaintiff's premises and injured them. No notice had been given to the defendant before commencing the action:—

Held, that the injury was occasioned by acts "done or intended to be done under the powers of the Metropolitan Board of Works," within the meaning of 25 & 26 Vict. c. 102, s. 106; and that the defendant, therefore, was entitled to a notice of action.

DECLARATION for negligence in making a sewer, and performing other works in a public highway, whereby the sewage flowed into the plaintiff's premises and injured them. Plea, not guilty, by statute 25 & 26 Vict. c. 102, s. 106. (1)

(1) 25 & 26 Vict. c. 102, s. 106. "No writ or process shall be sued out against or served upon, and no proceeding shall be instituted against the Metropolitan Board of Works, or any vestry or district board, or their clerk,

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The case was tried before Byles, J., at the first sittings in Middlesex in Hilary Term, when it appeared that the defendant was a contractor, employed by the Metropolitan Board of Works to enlarge the Counter's Creek sewer, and that, by the terms of the contract, the works were to be carried on according to the plans, and subject to the approval of the engineer of the Metropolitan Board of Works. The defendant, for the purpose of the works, built a dam across the sewer, and removed the water above it by pumping when necessary. Through the negligence of the defendant's servants on three occasions, the pump was not set to work when it ought to have been, and the sewage, consequently, flowed back through the drains into a house in the occupation of the plaintiff, and injured it.

The jury found a verdict for the plaintiff for 50*l.*, and leave was given to the defendant to move to enter a nonsuit, on the ground that no notice of action had been given, as required by 25 & 26 Vict. c. 102, s. 106.

Keane, Q.C., having obtained a rule,

Geo. Atkinson, Serjt., and *Gibbons*, shewed cause, and contended that the injury having been caused by the nonfeasance of the defendant in not keeping the pump working, the action was not brought for *an act done*, or intended to be done, under the authority of the act, citing *Umphelby* v. *M'Lean* (1), *Blakemore* v. *Glamorganshire Canal Company* (2), *Smith* v. *Shaw* (3); and that if the erecting the dam and neglect of pumping were to be considered

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or any clerks, surveyor, contractor, officer, or person whomsoever, acting under their or any of their directions, for anything done or intended to be done under the powers of such board or vestry, under the said acts or this act, until the expiration of one calendar month next after notice in writing shall have been served upon such board or vestry, or where the action or proceeding shall be against such officer or other person acting under their or any of their directions, shall have been delivered to him or left at his office or place of abode, stating the cause of action or grounds of the proceeding or demand, and the name and place of abode of the intended plaintiff or claimant, and of his attorney or agent in the cause or proceeding; and upon the trial of any action, the plaintiff shall not be permitted to go into evidence of any cause of action, except such as is stated in the notice so served or delivered, and unless such notice be proved, the jury shall find for the defendant."

(1) 1 B. & A. 42.

(2) 3 Y. & J. 60.

(3) 10 B. & C. 277.

as one course of conduct producing the injury, as in *Newton* v. *Ellis* (1), the defendant must have known that such a course of conduct would cause injury to the neighbourhood and was improper, and that he could not, therefore, have bonâ fide believed that he was acting under the authority of the act: *Williams* v. *Golding*. (2)

Keane, Q.C., and *W. A. Holdsworth*, in support of the rule, were not called on.

BYLES, J. I am of opinion that this rule should be made absolute, though I regret it, because it is undoubtedly a case of great hardship. There was no evidence of a want of bona fides, that is to say, of any indirect motive for the defendant's conduct. The question, therefore, is one of law, whether the injury was caused by an act done, or intended to be done, under the powers given by act of parliament to the Metropolitan Board of Works. The works were not being executed by the board themselves, but under a contract, one of the terms of which was, that the manner of doing the work should be such as should be pointed out by the board. The sewer, therefore, was certainly being enlarged under the powers of the act of parliament, and the injury was caused by a nonfeasance in the course of the necessary works. I cannot distinguish this case from that of *Newton* v. *Ellis*. (1) The words of the act in that case were, for "any thing done, or intended to be done, under the provisions of this act;" there, as now, the words "omitted to be done," being absent. The defendant, having made an excavation under the authority of the act, neglected to light it, in consequence of which the plaintiff fell into it, and was injured. The Court held that the matters complained of formed one course of conduct, which was in pursuance of the act, and that the defendant was entitled to notice. In the present case, the defendant stopped up the sewer, and neglected to drain it; and I think, upon the authority of that case, his conduct must be looked on as a whole, and that he was entitled to notice of action.

KEATING, J. I am of the same opinion. I am unable to distinguish this case in principle from *Newton* v. *Ellis*. (1) At one

(1) 5 E. & B. 115; 24 L. J. (Q.B.) 337. (2) Law Rep. 1 C. P. 69.

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time, I thought some distinction might be drawn, from the fact that the injury had been repeated; but I think, on the whole, if, on the first occasion, the injury arose from an act done under the authority of the statute, the subsequent injuries did so also.

MONTAGUE SMITH, J. I am of the same opinion. The injury was caused by building the dam, and then neglecting to pump; but it was the building the dam that was the real cause of the injury; and that was at any rate *intended* to be done, under the authority of the act. It is not necessary that the act should be done under the immediate direction of the Board of Works: if it is done by a person, in the course of fulfilling a contract into which he has entered for the purpose of carrying out the objects of the board, it is sufficient. I think, on the evidence in this case, we can only conclude that the defendant acted bonâ fide. We are a good deal bound by authority, *Newton* v. *Ellis* (1) being a very similar case, and the Court of Exchequer having acted upon the same principle in *Hardwick* v. *Moss.* (2)

Rule absolute to enter a nonsuit.

Attorney for plaintiff: *W. J. Hutchinson.*
Attorney for defendant: *Edmund Newman.*

(1) 5 E. & B. 115; 24 L. J. (Q.B.) 337; 7 Jur. N.S. 850
(2) 7 H. & N. 136; 31 L. J. (Ex.) 205; 7 Jur. N.S. 804

WILLIAMS AND ANOTHER *v.* CADBURY AND ANOTHER.

1867
May 8.

Landlord and Tenant—Debtor and Creditor—Composition Deed—Bankruptcy Acts 1849 *and* 1861 (12 *&* 13 *Vict. c.* 106, *s.* 129; 24 *&* 25 *Vict. c.* 134, *s.* 197).

When a tenant executes a composition deed, no distress for rent is available for more than one year's rent accrued due prior to the registration of the deed; the provisions of 12 & 13 Vict. c. 106, s. 129, having been made applicable to composition deeds by 24 & 25 Vict. c. 134, s. 197. (1)

THIS was a special case stated for the opinion of the Court without pleadings.

The plaintiffs were the trustees for the creditors under a composition deed entered into by one Lambert, the debtor. The defendants were landlords of Lambert, and had distrained for 390*l.*, being a year and a half's rent, due prior to the making of the deed. The plaintiffs paid the whole sum under protest, and brought this action to recover back 130*l.*, being the excess above one year's rent. It was admitted that the composition deed was duly executed, and that all the provisions of the 192nd section of the

(1) 12 & 13 Vict. c. 106, s. 129. "That no distress for rent made and levied after an act of bankruptcy upon the goods or effects of any bankrupt, whether before or after the issuing of the fiat, or the filing of the petition for adjudication of bankruptcy, shall be available for more than one year's rent accrued prior to the date of the fiat, or the day of the filing of such petition; but the landlord or person to whom the rent shall be due, shall be allowed to come in as a creditor for the overplus of the rent due, and for which the distress shall not be available."

24 & 25 Vict. c. 134, s. 197. "From and after the registration of every such deed or instrument in manner aforesaid, the debtors, creditors, and trustees, parties to such deed, or who have assented thereto, or are bound thereby, shall in all matters relating to the estate and effects of such debtor, be subject to the jurisdiction of the Court of Bankruptcy, and shall respectively have the benefit of, and be liable to, all the provisions of this act, in the same or like manner as if the debtor had been adjudged a bankrupt, and the creditors had proved, and the trustees had been appointed creditors' assignees under such bankruptcy; and the existing or future trustees of any such deed or instrument, and the creditors under the same, shall as between themselves respectively, and as between themselves and the debtor and against third persons, have the same powers, rights, and remedies, with respect to the debtor and his estate and effects, and the collection and recovery of the same, as are possessed, or may be used, or exercised by assignees or creditors with respect to the bankrupt, or his acts, estate, and effects in bankruptcy."

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Bankruptcy Act, 1861 (25 & 26 Vict. c. 134) had been complied with.

The question for the opinion of the Court was, whether the defendants, under the circumstances, were justified in levying the distress for more than one year's rent.

Mellish, Q.C. (*Beresford* with him), for the plaintiffs. The effect of the 197th section of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134) was held in *Wood* v. *Dunn* (1) to be to render a deed of composition, when registered, in all respects equivalent to an adjudication in bankruptcy. That was a question arising on the 184th section of the Bankruptcy Act, 1849 (12 & 13 Vict. c. 106); but the judgment on this point is equally applicable to the section now under consideration. It is true that s. 129 in terms speaks of a distress levied after an act of bankruptcy, and there has been no act of bankruptcy here; but that is in order that the provisions of the section may relate back to an act of bankruptcy, if it has existed. It is the clear meaning of the section, however, that its provisions should not be dependent on the commission of an act of bankruptcy, but should in any case apply to a distress levied after the fiat, and therefore they will now apply to a distress levied after the registration of a deed of composition.

Gray, Q.C. (*J. O. Griffits* with him), for the defendants. The section only applies to a distress for rent made and levied after an act of bankruptcy, and it can have no application, therefore, to composition deeds, which involve no act of bankruptcy. In the 184th section there is no reference to an act of bankruptcy; and the case of *Wood* v. *Dunn* (1) is therefore distinguishable.

BOVILL, C.J. It seems to me that the provisions of 12 & 13 Vict. c. 106, s. 129, must be considered as rendered applicable to composition deeds by 24 & 25 Vict. c. 134, s. 197. It is quite true that there is nothing in the nature of an act of bankruptcy in the proceedings relating to composition deeds; but the Bankruptcy Act, 1849, in effect provides that a distress shall not be available against assignees in bankruptcy for more than one year's rent accrued due previously to the issuing of the fiat, whether the

(1) Law Rep. 2 Q.B. 73.

distress be after the fiat, or even before it, if it be after an act of bankruptcy. Here, there being no act of bankruptcy, the section would only be available in respect of a distress made after the registration of the deed, which stands in the place of a fiat in bankruptcy.

BYLES, J. I am of the same opinion. It seems to me that the 129th section of the earlier act creates a relation to an act of bankruptcy, which shews the extreme limit to which its provisions extend. When, as here, there is no act of bankruptcy, by necessary implication the limit is a valid adjudication in bankruptcy, or the registration of a composition deed.

KEATING, J. I am of the same opinion. It would, I think, be impossible to give effect to the large words of the 197th section of the act of 1861 without holding that the provisions of the 129th section of the previous act were applicable to composition deeds.

MONTAGUE SMITH, J. I am of the same opinion. The general intent of the 197th section of the later act is to give to trustees under a composition deed the same remedies as if they were assignees under a valid adjudication in bankruptcy. No doubt the first words of the 129th section of the earlier act are not literally applicable to composition deeds, but the rest of the section is; and a period of time is mentioned as that before which the rent must have accrued due, which is made by the later act equivalent to the time when the deed is made and registered.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Davidson & Co.*
Attorneys for defendants: *Church & Sons.*

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May 6.

SHARLAND *v.* SPENCE AND ANOTHER.

Debtor and Creditor—Debts proveable in Bankruptcy, under 24 & 25 *Vict c.* 134, *s.* 153—*Unliquidated Claim—Deed under s.* 192.

To an action for unliquidated damages, for breach of contract in not accepting timber, the defendants pleaded a deed under the Bankruptcy Act, 1861, s. 192, made after action brought, between the defendants (debtors) of the one part, and trustees on behalf of "undersigned creditors" of the other, by which the defendants conveyed all their estate and effects to the trustees for the benefit of "the creditors of the debtors;" and in consideration thereof, the "said creditors" released the defendants from all debts, claims, and demands whatsoever; averments of the assent of the requisite majority of creditors, and of the due execution by the defendants and the trustees and of the registration of the deed, that possession of the defendants' property was given to the trustees, and that the plaintiff was a creditor in respect of the claim pleaded to within the meaning of the Bankruptcy Act, 1861, and was bound by the deed.

The plaintiff was not an undersigned creditor, and did not assent to the deed:—

Held, that the plea was no answer to the action; for that the plaintiff's claim, being for unliquidated damages, and not having been assessed under the provisions of s. 153, was not proveable in bankruptcy, and the plaintiff was not a creditor within the meaning of s. 192, and therefore not bound by the deed.

DECLARATION (upon a writ of summons issued on the 5th of July, 1866), claiming damages from the defendants for not accepting timber of the plaintiff, according to the terms of an agreement.

Fourth plea, setting out verbatim the provisions of a deed entered into after the accruing of the plaintiff's claim, and bearing date the 13th of August, 1866, between the defendants, debtors, of the one part, and certain trustees on behalf of "undersigned creditors" of the other part, by which the defendants conveyed all their estate and effects to the trustees, to be "administered for the benefit of the creditors of the debtors, as co-partners, and of the creditors of each of them separately, as if the debtors had been at the date thereof duly adjudged bankrupts; and in consideration thereof the said creditors of the debtors acquitted, released, and for ever discharged the debtors, and each of them, &c., from all and all manner of debts, claims, and demands whatsoever, then due or owing to the said creditors;" and it was thereby declared that the deed was intended to be registered and operate under the Bankruptcy Act, 1861, and to bind non-assenting creditors. Averments of the

assent in writing of the requisite majority of creditors, and of the execution of the deed by the trustees and by the defendants, and of its registration, and that the defendants immediately on the execution of the deed gave possession to the trustees of all the property comprised therein, and that at the time of the execution of the deed the plaintiff was a creditor of the defendants in respect of the claim pleaded to within the meaning of the Bankruptcy Act, 1861, and was bound by the deed as if he had been a party thereto.

Demurrer and joinder.

Montague Bere, for the plaintiff. The question in this case depends on the true interpretation of the 153rd section of the Bankruptcy Act, 1861. (1) That section renders a claim for unliquidated damages proveable in bankruptcy *after* its amount has been ascertained in the way pointed out. And the 197th section assimilates the rights of creditors under a composition deed to the rights of creditors in bankruptcy. The plaintiff's claim, however,

(1) 24 & 25 Vict. c. 134, s. 153: "If any bankrupt shall, at the time of adjudication, be liable, by reason of any contract or promise, to a demand in the nature of damages which have not been and cannot be otherwise liquidated or ascertained, it shall be lawful for the Court acting in prosecution of such bankruptcy to direct such damages to be assessed by a jury, either before itself or in a court of law, and to give all necessary directions for such purpose; and the amount of damage, when assessed, shall be proveable as if a debt due at the time of the bankruptcy: Provided that, in case all necessary parties agree, the Court shall have power to assess such damages without the intervention of a jury or a reference to a court of law."

s. 197: "From and after the registration of every such deed or instrument in manner aforesaid, the debtor, and creditors, and trustees, parties to such deed, or who have assented thereto, or are bound thereby, shall, in all matters relating to the estate and effects of such debtor, be subject to the jurisdiction of the Court of Bankruptcy, and shall respectively have the benefit of and be liable to all the provisions of this act, in the same or like manner as if the debtor had been adjudged a bankrupt, and the creditors had proved, and the trustees had been appointed creditors' assignees under such bankruptcy; and the existing or future trustees of any such deed or instrument, and the creditors under the same, shall, as between themselves respectively, and as between themselves and the debtor and against third persons, have the same powers, rights, and remedies, with respect to the debtor and his estate and effects, and the collection and recovery of the same, as are possessed or may be used or exercised by assignees or creditors with respect to the bankrupt, or his acts, estate, and effects in bankruptcy."

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has never been ascertained, and is, therefore, not proveable in bankruptcy, and the deed of composition is no bar to it. The case of *Hoggarth* v. *Taylor* (1) is directly in point; in that case, a similar plea was held bad. *Wood* v. *De Mattos* (2), it is true, decided that proveable claims are barred; but the plaintiff's claim here is not "proveable," for the reason already given, and he is not bound to avail himself of the provisions of that section, which is an enabling section only. In the case of *In re Penton* (3), Lord Cranworth, L.C., decided that a person claiming unliquidated damages need not come in under a deed of composition; and that if he did not do so when informed of the deed, but continued his action, he lost his right to come in. It would be very hard if persons claiming unliquidated damages were barred, since their claims cannot be taken into account in ascertaining whether the requisite proportion of creditors have signed the deed, and they can have no voice in the appointment of trustees, &c.

He was stopped by the Court.

Shield, for the defendant. The plaintiff will not be barred unless he is a creditor, but the decision of *Wood* v. *De Mattos* (2), in the Exchequer Chamber, is conclusive that he is a creditor. In that case, it was contended that creditors in respect of unliquidated damages would not be barred by the deed; that they were not "creditors" within the meaning of the 192nd section of the Bankruptcy Act, 1861, but the Court of Exchequer Chamber held that every one was a creditor within the meaning of that section who had at the time of the execution of the deed a claim against the debtor, proveable against his estate if he then became bankrupt.

[BOVILL, C.J. A person having a claim for unliquidated damages can make himself a creditor by complying with the provisions of s. 153, and so getting the amount of his debt ascertained.]

After the claim has been ascertained, it is strictly a "debt," but Blackburn, J., in delivering the judgment of the Court, says that "the word creditor is used in the sense of a person having a claim which can be proved under the bankruptcy, whether it is strictly a debt or not." The case of *Hoggarth* v. *Taylor* (1) is no authority

(1) Law Rep. 2 Ex. 105. (2) Law Rep. 1 Ex. 91, 12 Jur. N.S.

(3) Law Rep. 1 Ch. Ap. 158.

in this case, as the decision turned upon the construction of a deed different from the present one, and the effect of every deed depends on its particular terms. In that case, the releasing parties were to receive a composition secured by promissory notes, and, in consideration thereof, released the defendants from *their debts*. The Court held that, as no promissory notes could be given for the unliquidated claims, they did not come within the terms of the deed. In the present case the release is as general as possible, and is of all claims due from creditors, that is, according to *Wood* v. *De Mattos* (1), of all claims which could be proved under a bankruptcy.

[BYLES, J. A claim may be proveable in two senses: it may be proveable as a matter of right, or it may be proveable only if the Court allows it, and in the present case the claim is proveable in the latter sense.]

If the plaintiff has a discretion to go on with the action or claim under the deed, he is a creditor; and *In re Penton* (2) shews that he has that discretion.

[BOVILL, C.J. If the claim is disputed (3), the Court of Bankruptcy would refuse to assess the amount under the 153rd section.]

BOVILL, C.J. I am of opinion that the plaintiff is entitled to our judgment. I quite agree that the 153rd section of the Bankruptcy Act, 1861, is, by force of the 197th section, rendered applicable to composition deeds, as well as to bankruptcies: that was decided in the case of *In re Penton*. (2) That section for the first time makes claims for unliquidated damages proveable in bankruptcy, and its provisions are, I think, for the benefit of the creditor, and enable him to prove his claim, if he chooses, under certain conditions. Such claims, however, are only proveable in certain cases: thus, the question must be as to the amount only, and not as to the validity of the claim, and that amount must have been assessed in the way pointed out in the 153rd section. In the present case the claim is not admitted, and the amount has never been assessed, and the 153rd section therefore is, I think, wholly inapplicable.

It is said that there are authorities in favour of the defendants, and that *Wood* v. *De Mattos* (1), is in point. The question there

(1) Law Rep. 1 Ex. 91, 12 Jur. N.S. 70

(2) Law Rep. 1 Ch. Ap. 158.

(3) There were other pleas denying the defendants' liability.

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arose incidentally, and Blackburn, J., said that throughout the bankruptcy acts the word "creditor" is used in the sense of a person having a claim which could be proved under a bankruptcy, and in that I entirely concur; but in the present case the circumstances necessary to constitute the claim a proveable claim are altogether wanting. Next, the case of *Hoggarth* v. *Taylor* (1) was referred to. There two questions arose, first, whether any such deed was binding on the plaintiff under the terms of the act; and, secondly, whether the particular deed was so. The majority of the Court based their decision—that the deed was no bar to the action—upon the second ground, but Martin, B., appears to have rested his judgment on the first ground also. The remaining case cited, *In re Penton* (2), shews that, in the opinion of Lord Cranworth, L.C., a plaintiff in such a case as the present may, if he pleases, proceed with his action, but cannot afterwards come in under the trust deed and have the damages assessed under s. 153. That case, therefore, is also strongly in the plaintiff's favour.

BYLES, J. I am of the same opinion. It is clear that the plaintiff has no present right to prove his claim in bankruptcy; and I think he may never have such a right, if the Court of Bankruptcy should refuse its sanction to the amount of his claim being ascertained in the way provided by the act. The judgment of Martin, B., in *Hoggarth* v. *Taylor* (1), is precisely in point.

KEATING, J., concurred.

MONTAGUE SMITH, J. I cannot distinguish the case of *Hoggarth* v. *Taylor*. (1)

Judgment for the plaintiff.

Attorneys for plaintiff: *Bridger & Collins.*
Attorney for defendants: *J. W. Hitchin.*

(1) Law Rep. 2 Ex. 105. (2) Law Rep. 1 Ch. Ap. 158.

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May 1.

Notice of Action—"Found Committing"—24 & 25 Vict. c. 96, ss. 103, 113 —Fresh Pursuit—False Imprisonment.

A. purchased an article of B., and directed him to take it to his house and ask for payment. B. left the article at A.'s house at one P.M., and was paid for it by A.'s butler. A. returned home at three P.M., and was informed that the butler had paid for the article; and believing, although erroneously, that he himself had paid B. for it at the time of the purchase, immediately sent for a policeman and ordered him to arrest B. on a charge of obtaining money under false pretences. The policeman and A.'s butler at once went in pursuit of B., and apprehended him at ten P.M. By 24 & 25 Vict. c. 96, s. 113, it is provided that notice in writing of any action against any person for anything done in pursuance of the act, shall be given to the defendant one month at least before the commencement of the action; and by s. 103 of the same act it is provided that any person found committing any offence under the act (inter alia, obtaining money under false pretences), may be *immediately* apprehended without a warrant by any person. In an action by B. against A. for wrongful arrest:—

Held, that B. was "found committing the offence," if at all, at one P.M., and the pursuit not having been commenced till A.'s return at three P.M., A. could not have believed he was acting in pursuance of the statute, and was not entitled to notice.

DECLARATION for assault and false imprisonment.

Pleas:—First, not guilty, by statutes 24 & 25 Vict. c. 96, s. 113, and ss. 1, 2, 3, 88, and 89, and ss. 91 to 99 inclusively, and 11 & 12 Vict. c. 44. Secondly, that the alleged trespasses, if any, were committed after the passing of the 24 & 25 Vict. c. 96, and after the 1st day of November mentioned therein, and were committed in the county of Hertford, and no notice in writing of the commencing the action, and of the cause thereof, was given to the defendant one month before the commencement of the same, pursuant to the statute.

Issue thereon.

The case was tried before Byles, J., at the first sittings in Middlesex, in Hilary Term last, when the following facts were proved:—The defendant, a gentleman residing at Kytes, near Watford, met the plaintiff in Watford selling pine-apples; he agreed to purchase two pine-apples for half a crown each, and told the plaintiff to leave them at his house. At one o'clock on the

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same day the plaintiff called at the defendant's house and saw the defendant's butler, to whom he stated that the defendant had told him to leave the two pine-apples, and to ask for 5*s.* in payment of them, and the butler accordingly paid him that amount. The defendant returned home at three o'clock the same afternoon, when he was informed that the butler had paid for the pine-apples, and being under the impression that he had himself paid for them, sent for a policeman, who, with the defendant's butler and by the defendant's direction followed the plaintiff, and arrested him at ten o'clock the same evening on a charge of obtaining the 5*s.* by false pretences. The plaintiff was twice brought before the magistrates, and on the second occasion the charge was dismissed. It appeared from the evidence that the defendant was mistaken in supposing that he had paid the plaintiff. No notice had been given to the defendant before commencing the action. The jury found a verdict for the plaintiff, damages 20*l.*, and leave was reserved to the defendant to move to enter a non-suit, on the ground of no notice having been given to him before commencing the action, pursuant to the provisions of 24 & 25 Vict. c. 96, ss. 103, 113. (1)

Giffard, Q.C., having obtained a rule pursuant to the leave reserved,

Daly shewed cause. The defendant was only entitled to notice if he believed he was acting in pursuance of the act. The section under which, if at all, he believed he was acting is the 103rd. It is not sufficient that he should have believed that the plaintiff committed the offence, he must have believed that he

(1) 24 & 25 Vict. c. 96, s. 103, provides that "Any person found committing any offence, punishable either upon indictment, or upon summary conviction by virtue of this act . . . may be immediately apprehended, without a warrant, by any person, and forthwith taken . . . before some neighbouring justice of the peace, to be dealt with according to law" . . . .

s. 113. "All actions and prosecutions to be commenced against any person for anything done in pursuance of this act, shall be laid and tried in the county where the fact was committed, and shall be commenced within six months after the fact committed, and not otherwise, and notice in writing of such action and of the cause thereof shall be given to the defendant one month at least before the commencement of the action, and in any such action the defendant may plead the general issue, and give this act and the special matter in evidence at any trial to be had thereon" . . . .

was found committing it: see *Roberts* v. *Orchard*. (1) The meaning of "found committing," is shewn by the succeeding phrase, "immediately apprehended," to mean actually caught in the act of committing the offence. Here, on the contrary, the plaintiff was not arrested till ten P.M.

[BYLES, J. Does "found committing" mean found by the person who afterwards apprehends him?]

It must certainly be so interpreted. Here the butler did not apprehend him "immediately," and in fact it was the defendant who apprehended him, since he gave the orders. If a master is away in the country for a month, and on returning home is told that his butler was seen stealing his wine the day after he left home, could he then apprehend him without a warrant?

He was stopped by the Court.

Giffard, Q.C., and *J. O. Griffits*, in support of the rule. For the purpose of this argument, it is the same as if the offence had been actually committed, for there is no doubt that the defendant bonâ fide believed that it had. The only question therefore is, whether the plaintiff was found committing the offence, and immediately apprehended. If the plaintiff was taken after fresh pursuit, that is the same as if he had been apprehended on the spot.

[BOVILL, C.J. But here the fresh pursuit was after the discovery of the offence, not after the plaintiff was found committing it. The offence was committed, if at all, at one o'clock, and the pursuit did not commence till the return of the master at three o'clock.]

It was not till three o'clock that the plaintiff was found to have committed the offence; the object of the act is to prevent persons acting on what they hear from others: here the defendant and his butler together had seen the whole transaction, and formed, as it were, a composite person who found the plaintiff committing the offence. If a man saw a person come out of a house under circumstances which made him suspect that he had been stealing, and shortly after went into the house and found something had been stolen, that would be a sufficient "finding" within the act, and he would be entitled to pursue and apprehend the thief. There are two cases on the meaning of fresh pursuit. In *Han-*

(1) 2 H. & C. 769; 33 L. J. (Ex.) 65.

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way v. *Boultbee* (1) a person having been seen violently beating a dog, a constable was sent for, who followed and apprehended him at the distance of a mile; Tyndal, C.J., there says, that the object of the statute was to prevent a stale apprehension on an old charge, and that the words of the statute must not be taken so strictly as to defeat its reasonable operation. In *Rex* v. *Howarth* (2), which was an indictment for being in a dwelling-house with intent to commit a felony; the prisoner was seen in an outhouse by the prosecutor's servants, who went and called their master, and when he came, about a quarter of an hour afterwards, the prisoner had left the outhouse; but they pursued and apprehended him, and it was held to be a lawful apprehension, the whole being treated as one transaction.

BYLES, J. (3) I am of opinion that this rule must be discharged. The facts shew that the act which was supposed to be the offence, viz. obtaining the money, took place at one o'clock, and I think the plaintiff was then "found committing" the act. Although he was found committing the act by the butler, and it was the butler who, in fact, arrested him, yet I think the defendant might have been entitled to notice of action if he had been arrested at one o'clock, or after a pursuit immediately commenced. I think, however, that "immediately" must mean immediately after the commission of the offence, not after its discovery; here the pursuit was not commenced till the defendant came home at three o'clock, and I can conceive no substantial difference between the waiting for two or three hours or two or three months for the evidence of the offence to be complete. Under the circumstances of this action, I think no notice was required.

KEATING, J. The intention of the statute evidently is, that the criminal should be apprehended immediately on the commission of the offence. It is sufficient, if the person apprehended has been seen in a position which justified the belief that he had committed the offence; but, in the present case, I do not think that the

(1) 1 Mood. & Rob. 15. (2) 1 Mood. C. C. 207.
(3) Bovill, C.J. had left the court.

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defendant can have believed that the plaintiff was arrested immediately after having been found committing the offence, because the plaintiff received the money at one o'clock, some time before the defendant came home. It was, in fact, a fresh pursuit, not on the commission of the offence, but on the discovery of it.

MONTAGUE SMITH, J. I am of the same opinion. To entitle the defendant to notice of this action, he should have given evidence to shew, not only that he believed in a state of facts which shewed that the offence had been committed, but that he believed in a state of facts which shewed that the plaintiff had been found committing the offence, and had been apprehended after fresh pursuit. It seems to me that in this case there was nothing like fresh pursuit; several hours elapsed after the money was obtained, which, if anything, was the commission of the offence, before the butler was told, on the defendant's return, that the plaintiff had been previously paid. The pursuit may have been a fresh pursuit from that time, but it was not a fresh pursuit from the commission of the offence.

Rule discharged.

Attorney for plaintiff: *J. Olive.*
Attorney for defendant: *S. Camp.*

COPCUTT *v.* GREAT WESTERN RAILWAY COMPANY.

May 8.

County Court—Practice—Time for Moving for New Trial.

Where an action has been tried by a county court judge, under the provisions of 19 & 20 Vict. c. 108, s. 26; the time within which a motion for a new trial must be made runs from the day of the hearing of the cause, and not from the filing in the master's office of the registrar's certificate of the result.

THIS was a rule for a new trial. The action had been commenced in the Court of Common Pleas, and sent for trial before a county court judge, under the provisions of 19 & 20 Vict. c. 108, s. 26. (1) The hearing was on the 24th of January, but the

(1) 19 & 20 Vict. c. 108, s. 26: "Where in any action of contract brought in a superior court, the claim indorsed on the writ does not exceed 50*l.*, or where such claim, though it originally exceeded 50*l.*, is reduced by

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registrar's certificate of the result was not filed till the 21st of February. Hilary Term ended on the 31st of January. The rule for a new trial had been obtained within the first four days of Easter Term.

Henry James shewed cause. This rule was moved too late: by rule 50 of Hilary Term, 1853, a motion for a new trial must be made before the end of term, if the case is tried in term; and this rule applies equally when the case is tried before a county court judge, under the provisions of 19 & 20 Vict. c. 108, s. 26. It makes no difference that the certificate of the registrar was not filed till after the end of term; in the case of a writ of trial, the time for moving for a new trial runs from the day of trial, and not from the return of the writ, though in practice the two are usually the same day. In *Lewis* v. *Parry* (1), it appears to have been decided otherwise.

[BOVILL, C.J. That was before the rule of Hilary Term, 1853, and this Court has since held that the rule applied to writs of trial without reference to the return of the writ.] (2)

The case is tried in open Court, and a new trial may be moved for without waiting for the registrar's certificate, just as a similar motion can be made when the trial is in the superior court before signing judgment.

Holl, in support of the rule. The statute under which a trial before a county court judge takes place, is very different from that under which a writ of trial is issued. (3) In the case of writs

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payment into Court, payment, an admitted set-off, or otherwise, to a sum not exceeding 50*l.*; a judge of a superior court, on the application of either party after issue joined, may, in his discretion, and on such terms as he shall think fit, order that the cause be tried in any county court which he shall name, and thereupon the plaintiff shall lodge with the registrar of such court such order and the issue; and the judge of such court shall appoint a day for the hearing of the cause, notice whereof shall be sent by post, or otherwise, by the registrar to both parties, or their attorneys; and after such hearing the registrar shall certify the result to the master's office of such superior court, and judgment in accordance with such certificate may be signed in such superior court."

(1) 19 L. J. (Ex.) 192.

(2) *Carlin* v. *Parsons*, June 7, 1854. The case is not reported, but was handed up to the Court by the chief clerk.

(3) 3 & 4 Wm. 4, c. 42, ss. 17, 18.

of trial, judgment is signed on the verdict; but where the action is tried before a county court judge, judgment is signed on the certificate of the registrar.

[BYLES, J. The plaintiff is very much in the position of a person against whom a verdict has been given, but who has obtained a stay of execution; he must apply for a new trial before the end of the term.

KEATING, J. If the time ran from the filing of the registrar's certificate, the party would have to search from time to time to ascertain if the certificate had been filed, and if he missed doing so for four days, might lose his right to a new trial.]

Until the certificate is given, there is nothing before the Court upon which they can act.

BOVILL, C.J. I think this case comes within the rule of Hilary Term, 1853, and that the rule for a new trial must therefore be discharged.

BYLES, J. I am of the same opinion. It is of the last importance that parties should be held strictly to the rule that motions for a new trial must be made before the end of the term in which the trial takes place.

KEATING, and MONTAGUE SMITH, JJ., concurred.

Rule discharged.

Attorneys for plaintiff: *Lewis, Munns, Nunn, & Longden, for J. G. Shepherd, Luton.*

Attorneys for defendants: *Young & Co.*

May 16. [IN THE EXCHEQUER CHAMBER.]

CARR AND ANOTHER *v.* THE WALLACHIAN PETROLEUM COMPANY (LIMITED).

Ship and Shipping—Charterparty—Construction of Guarantee.

A. chartered a vessel from I. to L. with a full cargo of petroleum. A. being unable to supply the cargo, the owners of the vessel agreed to cancel the charter-party, and seek for another cargo, on A. guaranteeing the vessel a "sum of 900*l.* gross freight home." The owners procured a cargo whose estimated freight would have amounted to 556*l.* 14*s.*, but the vessel was lost on its way home:—

Held, that the owners were at any rate entitled to recover from A. the difference between the estimated and guaranteed freights, if not the whole freight of 900*l.*

APPEAL from a judgment of the Court of Common Pleas, discharging a rule that had been granted to reduce a verdict by 343*l.* 6*s.*

This action was on a guarantee given by the charterers of two vessels, the *Izamados* and the *Botassis*, to their owners of 900*l.* each, gross freight home. The vessels each loaded a cargo which, at the current rate of freights, fell short by 343*l.* 6*s.* of the guaranteed amount of 900*l.* The *Botas is* was totally lost on her homeward voyage. The facts of the case are fully stated in the report of the case in the court below. (1)

Edw. James, Q.C. (*Watkin Williams* with him), for the defendants, contended that the freight not being earned till the vessels arrived, there could be no deficiency in the freight earned till the voyage was completed; and that, the *Botassis* having been lost, the defendants were not liable in respect of it.

Field, Q.C. (*Sir G. Honyman, Q.C.*, with him), for the plaintiffs, was not called upon.

MARTIN, B. I am of opinion that the judgment is right. The only question is, what is the meaning of the contract. I think the meaning is, that at the port of lading such a cargo should be loaded that the estimated value of the freight should be 900*l.* If that is not the interpretation, it is, I think, an absolute guarantee of

(1) Law Rep. 1 C. P. 636.

900*l.* freight, and the plaintiffs would be entitled to recover the whole 900*l.*

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CARR v. THE WALLACHIAN PETROLEUM COMPANY (LIMITED).

BRAMWELL, B., concurred.

BLACKBURN, J. I am of the same opinion. It is possible that the defendants might have been entitled to have the verdict reduced by the amount of the premiums of insurance on 343*l.*; but this has not been asked for, and we have no materials for estimating the amount.

SHEE & LUSH, JJ., concurred.

Judgment affirmed.

Attorneys for plaintiffs: *Thomas & Hollams.*
Attorney for defendants: *A. Towers.*

[IN THE EXCHEQUER CHAMBER.]

May 16.

SKILLETT AND OTHERS *v.* FLETCHER AND ANOTHER.

Principal and Surety—Increase of the Duties of Principal—Liability of Surety.

Declaration on a bond conditioned for the due performance by A. of his duties as collector of the poor rates, and of the sewers and general rates for the parish of S., the bond to continue in force if A. held either office separately.

Breach, that A. received money in each capacity, and failed to pay it over.

Plea, that before breach two acts were passed increasing A.'s duties as collector of sewers and general rates, and under which he was also appointed collector of main drainage rates, by the persons under whom he held his other appointments. These acts altered the proportion in which certain sewers rates were to be borne by different parishes, increasing the proportion payable by the parish of S., and also imposed upon the sewers rates certain fresh charges of small amount:—

Held, affirming the judgment of the Court of Common Pleas, that the appointment of A. to the new office of collector of main drainage rates did not avoid the bond.

Held, also, that the changes introduced by the acts did not amount to an alteration of the office of collector of sewers rates to which A. was originally appointed, and therefore did not avoid the bond.

Held, also (Martin, B., dubitante), that the bond was divisible, and that the plea was bad, as affording no answer to the defendants' liability for A.'s breaches of duty as collector of poor rates.

THIS was an appeal from a judgment of the Court of Common Pleas in favour of the plaintiffs on a demurrer to a plea.

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The declaration was on a bond conditioned for the due performance by one Edward Skillett of his duties as collector of poor rates, and also of sewers and general rates, for the parish of St. Anne's, Limehouse. Breach, that he had received money in each capacity and failed to pay it over.

The plea alleged that by the provisions of the 21 & 22 Vict. c. 104, and 25 & 26 Vict. c. 102, the duties of the collector of sewers and general rates were altered and increased, and a new office of collector of main drainage rates created, to which Edward Skillett had been appointed by the same persons who had appointed him collector of the former rates.

Demurrer to the plea.

The pleadings are set out fully in the report of the case in the court below. (1)

Mellish, Q.C. (*Philbrick* with him), for the defendants. The office of collector of poor rates is not to be treated as distinct from that of collector of sewers and general rates. The bond was really in substance given as security for the due performance by Edward Skillett of his duties in collecting parish rates.

[LUSH, J. You contend, then, that if the sureties are responsible at all, they are so for the whole of Skillett's defalcations.]

It is not necessary to go to that extent. If additional duties are imposed on the principal, which are quite distinct from those in respect of which the surety became bound, he may remain bound as to the latter, though no liability can be imposed on him in respect of the former. The principal case on this subject is *Bonar* v. *Macdonald*. (2) It seems difficult to distinguish that case from the present.

[BLACKBURN, J. In Scotland the judges are judges of fact as well as law, and the judgment in that case seems to be chiefly a resolution as a matter of fact that the office which had been held by the principal had been changed.]

The case of *Bonar* v. *Macdonald* was followed in *Pybus* v. *Gibb*. (3)

[BRAMWELL, B. There the defendant was not surety for the

(1) Law Rep. 1 C. P. 217; 12 Jur. N.S. 295 (2) 3 H. L. C. 226.
(3) 6 E. & B. 902; 26 L. J. (Q.B.) 41, 3 Jur. N.S. 315

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due performance of two offices. In this case the defendants are security for the due performance of two contracts, and it should seem that any alteration in one would still leave the defendants liable in respect of the other.]

In *Bonar* v. *Macdonald* (1) the fresh duties were quite distinct from the old ones, for it is no part of the duty of a bank manager to be responsible as a del credere agent for the solvency of customers.

[LUSH, J. The sureties there became responsible generally for the due performance by the principal of all the duties of his office; therefore, if the sureties had been liable for any, they would have been liable for all the duties of the new office, which the principal undertook. Here the condition is that Skillett shall pay over certain moneys, and that would not render the defendants liable for his default in respect of any other moneys, of which he was appointed collector, even if the bond continued in force.

The judgments in *Pybus* v. *Gibb* (2) do not proceed on that ground, but on the ground that though the sureties were not liable in respect of the new duties undertaken by their principal, yet the existence of those new duties would increase the risk of the principal failing to perform his original duties, and thus increase their liability. Coleridge, J., in that case says: "Let any man say if he would think it the same thing to become surety for a person who was exposed to collateral liabilities as for one that was not. The chance of the solvency of the principal is a great element in the risk."

[MARTIN, B. Has there been, in fact, any alteration of the sewers rate?]

The two acts referred to are 21 & 22 Vict. c. 104, and 25 & 26 Vict. c. 102. The first of these authorized the Metropolitan Board of Works to impose a new rate, called the main drainage rate, to be levied "in like manner, and subject to the like provisions as the sewers rate;" and although it may not have been legally necessary that this new rate should be collected by the collectors of the old sewers rate, yet practically it was so as a means of saving labour and expense, and Skillett did in fact collect it. The second act, by s. 3, alters the proportion in

(1) 3 H. L. C. 226. (2) 6 E. & B. 902; 26 L. J. (Q.B.) 41.

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which certain parishes named in the schedule to the act shall repay certain sums of money which had been borrowed by the Metropolitan Commissioners of Sewers, and the proportion to be paid by the parish of St. Anne's, Limehouse, was increased. By s. 10, the vestry are empowered to include in one the old sewers rate and the main drainage rate; and s. 70 empowers the vestry to defray the expenses of drinking fountains in the parish out of the sewers rate. These acts, therefore, greatly altered and increased Skillett's duties as collector.

M'Mahon, for the plaintiffs, was not called on.

MARTIN, B. I am of opinion that our judgment should be for the plaintiffs. The facts of the case are, that Edward Skillett was appointed collector of poor rates of the parish of St. Anne's, Limehouse, and was subsequently appointed collector of the sewers and general rates of the same parish; and the defendants entered into a bond that he should duly account for the money received by him in these two offices. It appears from the plea that a new and distinct rate was subsequently imposed by act of parliament, viz. the main drainage rate, and that Skillett was appointed to collect that also. The question is, whether that appointment put an end to the liability of the defendants. The law laid down in *Lord Arlington* v. *Merricke* (1), which has been followed ever since, is, that any substantial change in the office of the principal, without the sureties' consent, discharges them from their liability. Here, however, I think there is no change in the office. Mr. Mellish has failed to shew that the sewers rate is altered by the acts of parliament relied on. The amount has, no doubt, been increased by some small additions, such as the charges for drinking fountains; but the nature of the rate has not been changed, and the main drainage rate is a wholly distinct rate. In *Bonar* v. *Macdonald* (2), the principal was appointed to a distinct office, and it would have been impossible to hold the sureties liable in respect of some of its duties and not of others, consistently with the terms of their bond. So also in *Pybus* v. *Gibb* (3) the office was altered; but here the liability of Skillett, as collector of the poor rates and sewers rates,

(1) 2 Saund. 403.
(2) 3 H. L. C. 226.
(3) 6 E. & B. 902; 26 L. J. (Q. B.) 41.

was substantially the same before and after the main drainage rate was imposed, and the judgment of the Court below was, therefore, in my opinion correct. Had the acts in fact altered the character of the sewers rates, I should have desired further time to consider my judgment.

BRAMWELL, B. I think the judgment ought to be affirmed, for the reasons given in the judgment in the Court of Common Pleas, viz. that the defendants were sureties for the due performance by Edward Skillett of two distinct offices; and the plea affords an answer only to their liability in respect of his breaches of duty in one office, while the declaration alleges breaches of duty in both. I agree also, however, with my Brother Martin. In *Pybus* v. *Gibb* (1) the marginal note is, "Held, that these statutes had so materially altered the nature of the office of bailiff, that the sureties were no longer liable to indemnify the high bailiff, even though the misconduct of G. was in respect of a matter within the jurisdiction conferred by statute, 9 & 10 Vict. c. 95, in respect of which the duty of the bailiff was not altered by subsequent acts." I cannot help saying this is much more satisfactory than some of the expressions in the judgment, because it puts the matter on the right ground that the office was altered. In the present case it is said that the office, for the due performance of which the defendants were responsible, was altered in two respects. Skillett was collector of sewers rates, and it is said that acts of parliament, subsequently to the date of the bond, altered and increased the objects to which the rate was to be applied. I think that the answer is that the rates are, notwithstanding, in substance the same; the mere fact that a halfpenny in the pound is applicable to a different purpose does not make it a different rate. Secondly, it is said that the appointment of Skillett collector of the main drainage rates was an alteration in the office; but I think the defendants are in a dilemma; either the main drainage rate is a "sewers rate," and comes within the terms of the bond, or it is a different and distinct rate, and then the old office is not changed, but an entirely new and distinct one added. I think, therefore, that there has been no change in the office of the principal, and for that reason also the defendants' bond is still valid.

(1) 6 E. & B. 902; 26 L. J. (Q.B.) 41, 3 Jur. N.S. 815

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BLACKBURN, J. I am of the same opinion. I agree with the Court of Common Pleas that the bond is divisible, and that the plea is bad, as not affording an answer to all the breaches alleged in the declaration, but I also agree that the sewers rate has not been changed by the acts of parliament referred to; the amount of the rate has been increased, as it would have been if the neighbourhood had become richer, but the duties of the collector of the rate remain the same. The third question is as to the main drainage rate; that is not, I think, a "sewers rate," and it amounts, therefore, to this, that the principal has been appointed to an additional office. I can find nothing in law or reason which obliges me to say that the mere appointment of the principal to a new and distinct office discharges the sureties. The marginal note in *Pybus* v. *Gibb* (1) seems to me to be correct, and it agrees with Lord Campbell's judgment. The question in this case is, whether the nature of the office in respect of which the bond is given is altered. In *Bonar* v. *Macdonald* (2) the condition of the bond was that the sureties should be responsible for the due performance by their principal of the duties of the office he then undertook, and one of the parts of the bond was an agreement that the principal should not undertake any other business, and Lord Cottenham relies mainly on that stipulation in his judgment. The effect of that judgment, therefore, really is, that if parties become sureties upon the terms that the principal shall not undertake any fresh duties, they are released if he does so, and in the present case, if the sureties had stipulated that Skillett should not become collector of any fresh rate, there would be no doubt that they were no longer bound; but this bond contains no such condition.

SHEE, J. I am of the same opinion. In this case Edward Skillett was appointed collector of poor rates in 1852, and collector of sewers and general rates in 1856, and the defendants gave a bond as security for the due performance by him of his duties while he remained collector of all or some or one of these rates. The declaration alleges a default in paying over the moneys he received for each of these rates. To this it is pleaded that his duties were much increased by certain acts of parliament. If it had appeared

(1) 6 E. & B. 902; 26 L. J. (Q.B.) 41. (2) 3 H. L. C. 226.

that his duties and responsibilities in his office of collector of poor rates, also in his office of collector of sewers rates, and also in his office of collector of general rates, had been altered and increased, I should have thought it came within the cases that have been cited, and that the sureties were discharged; but it does not appear that the duties of Skillett, as collector of poor rates, have been altered, nor does it appear from the acts we have been referred to that his duties and responsibilities as collector of sewers and general rates have been altered or enlarged, but only that a distinct rate has been imposed, and the same person appointed to collect it. The offices, therefore, originally held by Skillett have not been altered, but he has been appointed to a new office. I think that the plea is bad for the reason given by the Court of Common Pleas, as it is pleaded generally to the whole declaration, and I think it is also bad on the other grounds which have been stated by my Brother Martin.

LUSH, J. I am of the same opinion. There is no doubt about the principle that governs these cases; the only doubt is as to its application in the present instance. If the office is altered by the addition of new duties, the surety is discharged; and it is no answer to say, that if the old office had remained, the principal would have incurred the same debts, and the surety have been responsible, because the old office does not exist, and it was only for wrong acts committed by the principal in the old office that the surety is liable. I think the present case does not come within the rule, for I think the acts referred to did not alter the office of collector of sewers rates; and the addition of a new office, that of collector of the main drainage rate, could not do so. Even, however, if the sewers rate had been altered by the act, I think the plea would be bad, for the reasons given by the Court of Common Pleas, the offices of collector of poor rates and collector of sewers rates being distinct, and the plea affording no answer to the liability arising from the breaches of duty committed by Skillett as collector of poor rates.

Judgment affirmed.

Attorney for plaintiffs: *A. A. Walter.*

Attorneys for defendants: *Walters & Gush.*

May 13.

MILLS *v.* THE MAYOR, ALDERMEN, AND BURGESSES OF COLCHESTER.

Custom—Licence to Fish—Reasonable Fee—Legal Origin.

The owners of an oyster fishery had, since the reign of Elizabeth, held courts, and granted, for a reasonable fee, licences to fish, to all persons inhabiting certain parishes who had been apprenticed for seven years to a duly licensed fisherman. In an action by a person so qualified against the owners of the fishery for not granting him a licence to fish, on payment of the usual fee:—

Held, that as every act of fishing had been by licence, there had been no enjoyment as of right so as to give rise to a custom.

Semble, that it was no objection to the custom, if otherwise good, that the fee alleged to have been paid for the licences was not a fixed fee, but a fee of reasonable amount.

Bryant v. *Foot* (Law Rep. 2 Q. B. 161) and *Lawrence* v. *Hitch* (Law Rep. 2 Q. B. 184, n.) questioned.

THIS was an action by an oyster dredger against the corporation of Colchester, for refusing to grant him a licence to fish on payment of the accustomed fee.

The declaration originally contained two counts, founded on 31 Geo. 2, c. lxxi, which were held bad on demurrer: see *Mills* v. *Mayor &c. of Colchester*. (1) By leave of the Court, and in consequence of a suggestion then thrown out, a third count was added, which alleged that the borough of Colchester was, and from time immemorial had been, an ancient borough, and the burgesses thereof had from time immemorial been a body corporate, being the defendants in the present action; that the defendants and their predecessors had, from time whereof the memory of man was not to the contrary, been seised as of fee in an oyster fishery in the river Colne and the creeks and branches thereof, and the said fishery had been under the governance of the defendants and their predecessors; that during the time aforesaid there had always been within the said borough of Colchester and certain parishes adjoining the river—that is to say, the parishes of Willenhoe, East Donyland, Finjinghoe, Alresford, Lingenhoe, East Mersea, Brightlingsea, and St. Osyth—divers oyster dredgermen using the craft and occupation of oyster dredging; and that, from time whereof the memory of man was

(1) 17 C. B. (N.S.) 635.

not to the contrary, there had been, and was, an ancient and laudable custom used within the said borough of Colchester and the said parishes that the defendants and their predecessors had of right in every year holden courts, and at such courts granted a licence to dredge oysters in the fishery for the ensuing oyster season, according to the rules and orders from time to time made by the defendants and their predecessors for the government and regulation of the fishery, to every such oyster dredger inhabiting the borough of Colchester, or any of the said parishes, who had served an apprenticeship of seven years to any other oyster dredger so licensed, and who had applied for the said licence, upon payment to the defendants and their predecessors of a reasonable fee for such licence; and that every such oyster dredger so qualified had of right been used to demand and have the same of the defendants and their predecessors upon payment of such reasonable fee. Averments that the plaintiff was an oyster dredger so qualified, and that the defendants held a court pursuant to the custom on the 29th of February, 1864, for the purpose of granting licences, and at such court did grant divers licences pursuant to the custom to dredge and take oysters in the fishery for the ensuing oyster season to divers oyster dredgers, who were entitled to and applied for the same, on payment of a reasonable fee, pursuant to the custom; that the plaintiff, at the said court, applied for and demanded of the defendants a licence to dredge oysters upon payment to the defendants of a reasonable sum, and tendered the same to the defendants; and that all conditions precedent had been performed: yet the defendants made default, and refused to grant any such licence to the plaintiff.

To this count the defendants pleaded several pleas, of which the only one now in question was a traverse of the custom, and they also demurred.

The case was tried at Chelmsford, at the spring assizes, in 1865, when, by order of the Court and consent of the parties, a verdict was entered for the plaintiff, subject to a special case.

From the case, which set out at length the evidence taken at the trial, including a large number of voluminous documents, it appeared that the defendants and their predecessors had been, from

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time immemorial, the owners of an oyster fishery in the river Colne. That for many years they had annually held courts, called admiralty courts, at which they granted a licence to dredge for oysters to any dredgerman applying for it, who belonged to one of eight parishes which adjoined the river, and who had been apprenticed for seven years to a duly licensed dredgerman, on payment of 2*l.* 2*s.* for four dredges.

The first admiralty court, of which any record was to be found among the documents of the corporation, was held in 1644; but, previously to that, law hundred courts had been held, at which persons appear from the entries to have been amerced in various sums for offences against the fishery. There was no entry, in any of the documents of the corporation, of any licence having been granted previous to an ordinance of the 9th of Elizabeth, made by the bailiffs, alderman, and common council of the borough, by which it was provided that no person should dredge for oysters within the waters of the liberty of the town of Colchester, without licence from the bailiffs of the town.

The earliest instance of the sum of 10*s.* 6*d.*, or any other sum, being fixed as the fee for a licence was in the year 1709, and several instances were shewn in which the payments for licences had been lessened, on account of the badness of the season. The minutes of an admiralty court, otherwise called a conservancy court, of 1707, contained a presentment of the jury, "that no licence ought to be granted to any person whose full residence and settlement should not be in one of the eight parishes aforesaid as usual:" no earlier proof was adduced of the right being confined to the eight parishes. It was admitted that the plaintiff was a duly qualified dredgerman, and that he had tendered 2*l.* 2*s.*, demanded a licence, and been refused it, for the purpose of testing the validity of the alleged right. The Court were to be at liberty to draw any inferences of fact.

The question for the opinion of the Court was, whether the plaintiff was entitled to have granted to him a licence to dredge and take oysters in the fishery, upon payment of 2*l.* 2*s.*, either as the usual and accustomed fee, or as a reasonable fee for such licence.

J. Brown, Q.C. (*Pollock, Q.C.*, with him), for the plaintiff. First,

with reference to the facts, the evidence shews that the alleged custom has existed for many years past, and its existence is not disproved by the earlier documents; the Court is, therefore, bound to presume that it has existed from time immemorial: *Shepherd* v. *Payne* (1); *Malcomson* v. *O'Dea* (2); *Jenkins* v. *Harvey* (3); *The Duke of Beaufort* v. *Smith.* (4) The fact that the fee has not been raised for 150 years, shews that the licence was obtained as of right. [The arguments on the above questions of fact were of great length, but are omitted, being immaterial in the view taken by the Court.] Secondly, on the question of law, it will be said that a profit à prendre cannot be claimed by custom; but there is an exception when a consideration such as a fee is given for the profit taken: *Tyson* v. *Smith* (5); *Rogers* v. *Brenton.* (6)

It will be said that the body of claimants is too indefinite, but it is as well defined as it was in either of the two last-mentioned cases. It is unnecessary to shew the origin of a custom if its existence during the whole of living memory is shewn, and it can have had a legal origin: *Lockwood* v. *Wood* (7); *Cocksedge* v. *Fanshaw.* (8) Here the custom fulfils all the necessary requisites laid down by Lord Holt in *Cudden* v. *Estwick.* (9) "A reasonable fee" is not necessarily bad in a claim by custom: *Laybourn* v. *Crisp* (10); *Shepherd* v. *Payne* (1); and here the fee of 2*l.* 2*s.* is reasonable, for it has been accepted without complaint for the last 150 years.

Denman, Q.C. (*Montague Chambers, Q.C.*, *R. E. Turner*, and *Philbrick*, with him), for the defendants. The ancient documents shew that the custom at any rate in the form alleged cannot have been in existence at their date; but that the practice with respect to the licences to fish has varied from time to time.

The ordinance of the time of Queen Elizabeth was the origin of the custom of granting licences, and the origin of the custom being

(1) 16 C. B. (N.S.) 132; 33 L. J. (C.P.) 158, 10 Jur NS 540
(2) 10 H. L. C. 593, 9 Jur NS 1135.
(3) 2 C. M. & R. 393; 1 C. M. & R. 877.
(4) 4 Ex. 450; 19 L. J. (Ex.) 97.
(5) 6 Ad. & E. 745; 9 Ad. & E. 406.
(6) 10 Q. B. 26; 17 L. J. (Q.B.) 34.
(7) 6 Q. B. 50; 15 L. J. (Q.B.) 36.
(8) 1 Dougl. 118.
(9) 6 Mod. 124.
(10) 4 M. & W. 320.

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shewn, the presumption arising from its existence in later times is rebutted, as was the case in *Church* v. *Tame* (1) in this court.

The case of *Selby* v. *Robinson* (2) shews that a custom must be alleged with all its particulars, and there are several points in which the custom as alleged here is clearly not supported by the proof. The rule that, if a custom has existed for sixty years a judge should direct a jury that they must find it is an immemorial custom, applies only when there is no contrary evidence: *Jenkins* v. *Harvey* (3), as explained by *The Master, Pilots, and Seamen of Newcastle* v. *Bradley*. (4)

3 C P. 576

(1) This was an action of trespass, brought to try a right of common claimed by the defendant over a piece of land called Old Oak Common, in the parish of Ealing, as appurtenant to a farm held by him. The case was tried by Willes, J., at the sittings in Middlesex after Michaelmas Term, 1862; and a special case was stated, setting out the evidence given at the trial, for the opinion of the Court on the questions both of fact and law. From the evidence, it appeared that the defendant and his predecessors in estate had, for thirty years previously, pastured their cattle on the land: but it was shewn on behalf of the plaintiff that all the inhabitants of the parish of Ealing had been in the habit of turning animals of various kinds on to the land, whether they were possessed of any land to which right of common could be attached or not; that the land had been leased, as part of the manor of Sutton Court, since the reign of Henry VIII., and no mention appeared in any of the leases or other documents of any rights of common prior to 1795; that in that year an act was passed authorizing an extension of the Grand Junction Canal (36 Geo. 3, c. 25, s. 6), by which it was provided that when any part of a common was taken by the company they should pay compensation for the common rights to the churchwardens of the parish in which the common was situated. It was also proved that a considerable compensation had been paid about the year 1805, under this section, to the churchwardens of the parish of Ealing, in respect of a part of the locus in quo which had been taken by the company and which was then lying waste, and that subsequently to that time the parish had demanded and received compensation in respect of common rights from railway companies for other parts of the common.

The special case was argued in Michaelmas Term, 1865, by *Manisty, Q.C.*, *Kemplay*, and *Bompas*, for the plaintiff; and *Montague Smith, Q.C.*, *Mellish, Q.C.*, and *Coxon*, for the defendant. The Court (Erle, C.J., Willes, Byles, and Keating, JJ.) held that the exercise of rights of common by other persons who could not have had such rights would not have prevented the thirty years' user by the defendant from being sufficient evidence of his right by prescription at common law; but that the plaintiff having shewn that the user originated in consequence of the passing of the Grand Junction Canal Act, the presumption arising from the subsequent user was rebutted, and they gave judgment for the plaintiff.

(2) 2 T. R. 758.

(3) 1 C. M. & R. 877; 2 C. M. & R. 393.

(4) 2 E. & B. 428 n; 21 L. J. (Q. B.) 196.

Even if a payment of a reasonable fee can be sustained in law, the evidence in this case is rather of a fixed fee than a fee of reasonable amount, and the fee of 2*l.* 2*s.*, if a fixed fee, would be rank. *Shepherd* v. *Payne* (1) is not in point, because that was an action for fees for work done, and it was held that a continuous office implied an officer who must have reasonable remuneration for his work. In *The Duke of Beaufort* v. *Smith* (2), there was evidence of a uniform payment since the time of Henry VIII., and only some conflicting evidence as to some slight irregularities occurring from time to time, which the Court held were unintentional, and did not disprove the custom.

Even if the custom were proved, it is bad in law. First, this is a profit à prendre which cannot be claimed by custom: *Lloyd* v. *Jones* (3); *Wickham* v. *Hawker* (4); *Race* v. *Ward* (5), in which it was held that a right to take water was only an easement, and not a profit à prendre. In *Bland* v. *Lipscombe*, given in a note to that case (6), it was held that a custom to angle for, catch, and carry away fish was bad. It is said that *Tyson* v. *Smith* (7) is an authority to shew that the fact of the payment makes the custom good.

[WILLES, J. That was not really a profit à prendre, and it amounts, therefore, only to a dictum.]

In *Rogers* v. *Brenton* (8), the custom was decided to be unreasonable on another ground. That case was decided on the stannary rules, which are part of the law of England, and was not, therefore, the ordinary case of a custom: per Wilde, C.J., in *Lloyd* v. *Jones* (9): and it was further distinguishable on the ground that it was only if the lord did not choose to work the mine that the tin bounders could claim to do so. The case of *Duke of Falmouth* v. *Alderson*, reported in Smirke's edition of *Vice* v. *Thomas*, p. 39, shews that the tin bounders have an interest in the mine, and not a mere easement. *Constable* v. *Nicholson* (10) must be held to

(1) 12 C. B. (N. S.) 433; 31 L. J. (C.P.) 297; 16 C. B. (N.S.) 132; 33 L. J. (C.P.) 158.
(2) 4 Ex. 450; 19 L. J. (Ex.) 97.
(3) 6 C. B. 81; 17 L. J. (C.P.) 206.
(4) 7 M. & W. 63.
(5) 4 E. & B. 702; 26 L. J. (Q.B.) 133.
(6) 4 E. & B. 713 n.
(7) 6 A. & E. 745; 9 A. & E. 406.
(8) 10 Q. B. 26; 17 L. J. (Q.B.) 34.
(9) 6 C. B. at p. 88.
(10) 14 C. B. (N.S.) 230; 32 L. J. (C.P.) 240.

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have finally decided that a claim of a profit à prendre in alieno solo is bad, and is distinctly in point; and in *Attorney General* v. *Mathias* (1), the cases are elaborately discussed by Byles, J., and the same law laid down.

The existence of licences in this claim distinguishes it from all others, and shews that the acts of user were not as of right. The custom as laid down would exclude, too, the owners of the fishery themselves. All the requisites of a custom are given in Broom's Commentaries, pp. 1—24, and not one of them is fulfilled in the present case.

Brown, Q.C., in reply. The substance here is, the right to take the fish on payment of a given sum, and the licence is a mere matter of form. In some manors there is a custom for the lord to grant licences to leases. So by custom the lord is bound to admit customary tenants, when entitled under a proper surrender. Similar customs also exist all along the coast, and differ very widely from a bare custom to take a profit à prendre, because the profit cannot be enjoyed unless the person claiming it expends much time and labour in preparation. It fulfils the three requisites mentioned in *Cudden* v. *Estwick* (2): first, the owners receive the benefit of the payments made for the licences, and the keeping up of the fishery; secondly, the dredgers are at the charge of those payments, and also at the expense of keeping up the fishery; thirdly, there is a reasonable origin, because the corporation could not avail themselves of the fishery so well in any other way. This claim could not be made by prescription, as attached to a house or lands, and so may be made by custom from the necessity of the case: *Rogers* v. *Brenton*. (3) If the lord of a manor had a fishery, the tenants might clearly claim a right to fish by custom, and this is a very similar case, and the claimants appear to own a kind of suit and service to the admiralty courts. *Rogers* v. *Brenton* (3) does not stand alone, but all the cases are collected there, amongst them *Arkright* v. *Cantrell* (4), which related to mining, in Derbyshire. The case of *Bryant* v. *Foot* (5) was

(1) 4 K. & J. 579; 27 L.J. (Ch.) 761.
(2) 6 Mod. 124.
(3) 10 Q. B. 26; 17 L. J. (Q.B.) 34.
(4) 7 A. & E. 565.
(5) Law Rep. 2 Q. B. 161.

only decided on the ground that the amount of the fee was rank, and there is no reason to say that the fee here is so.

Cur. adv. vult.

May 13. The judgment of the Court (Willes, Keating, and Montague Smith, JJ.), prepared by Willes, J., was read by

MONTAGUE SMITH, J. This case was ably argued in last Hilary Term before Keating and Montague Smith, JJ., and myself, when we took time to consider.

It was an action brought by an oyster dredger against the corporation of Colchester, to recover damages and a mandamus on the occasion of their refusal to grant him a licence to fish for oysters in an ancient oyster fishery in the river Colne, pursuant to an alleged immemorial custom used within the borough of Colchester and certain parishes adjoining to the river, viz. that the defendants and their predecessors have of right in every year holden courts, and at such courts granted a licence to dredge oysters in the said fishery for the ensuing oyster season, according to the rules and orders from time to time made by the defendants and their predecessors for the government and regulation of the said fishery, to every such oyster dredger inhabiting the said borough of Colchester, or any of the parishes, who had served an apprenticeship of seven years to any other oyster dredger so licensed, and who hath applied for the said licence, upon payment to the defendants and their said predecessors of a reasonable fee for every such licence, and that every such oyster dredger, so qualified as aforesaid, hath of right been used to demand and have the same of the defendants and their predecessors upon payment of such reasonable fee.

The question turned upon, first, the proof of the custom, and secondly, its validity if proved. In the view we take of the case the two questions are inextricably connected, because there is no proof of the actual existence of the practice alleged to be binding earlier than the reign of Anne, and unless it could have had a legal origin, there is no reason why we should refer it by inference to that more remote period from which, probably because of the public convenience in preventing the accumulation of abnormal burthens and the growth of novel ones, it is still thought expedient

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that customary claims by or against the inhabitants of a district should be capable of having come down.

Many objections to the custom were offered, more or less formidable, the most striking of which are as follows:—

First objection, that the claim is to a profit to be taken from the land of another, which ordinarily cannot spring from custom, because of the tendency of such a claim, if enjoyed by large numbers of persons, to exhaust the profit of the land, and leave nothing for the owner, which is deemed unreasonable, whereas a custom to be valid must be reasonable.

To this objection it was answered that although a general custom to fish without payment would be void, yet this case is distinguished by the payment for the licence, which might, in favour of ancient enjoyment, be deemed a sufficient restriction on the one hand, and satisfaction or return for the profit taken on the other, to make the custom reasonable, according to the doctrine of the Exchequer Chamber in *Tyson* v. *Smith*. (1)

Secondly, however, it was objected that, looking to the pleadings, the sum payable for the licence was not alleged to be a fixed, but only a reasonable compensation, which must necessarily vary from time to time, and so that the custom was void from uncertainty; or that, looking to the evidence as to payment of a fixed sum in connection with the change in the value of money during the period over which the payment ran, the custom must be unreasonable or impossible. This argument is founded upon a supposed difficulty in sustaining a custom for a reasonable payment, not being a fixed and arbitrary sum, but capable of varying in nominal amount with the value of money from time to time, and derives considerable authority from the judgment of the majority of the Court of Queen's Bench (Cockburn, C.J., Mellor, and Lush, JJ.) in the late cases of *Bryant* v. *Foot* (2), and *Lawrence* v. *Hitch* (3), where the learned judges dissented from what they considered to be a novel assumption of this Court in the judgment in *Shepherd* v. *Payne* (4), that a customary fee need not be of an amount fixed before legal memory, but may be of reasonable amount, like a toll.

(1) 9 Ad. & E. 406.
(2) Law Rep. 2 Q. B. 161.
(3) Law Rep. 2 Q. B. 184 n.
(4) 12 C. B. (N.S.) 433; 31 L. J. (C.P.) 297; 16 C. B. (N.S.) 132; 33 L. J. (C.P.) 158.

3 QB 504 520

It is observable, however, that Bramwell, B., in the Exchequer Chamber (1), and the dissentient judge, Blackburn, J., in the Queen's Bench (2), adopted the opinion of this Court, and further, that the attention of the majority of the Court of Queen's Bench does not appear to have been directed to the authorities which sustain customary or prescriptive claims for reasonable amounts, such as 1 Blackstone's Commentaries, 78, where the nature of a valid custom in respect of certainty is explained; nor to the authorities, such as Com. Dig. tit. Toll (E), *Drake* v. *Wiglesworth* (3), and *Gard* v. *Callard* (4), which shew that toll of a reasonable amount may be claimed by grant, or by prescription, which stands upon the same footing as custom; nor to the opinion of Lord Holt in *Ballard* v. *Gerard* (5), who seems to have taken for granted that there may be a reasonable fee annexed to an ancient office (which fee, as Blackburn, J., said in *Bryant* v. *Foot* (6), may in process of time have become taxed at a given sum; nor to the circumstance that fees to the church were not fixed in ancient times (see judgment in *Fuller* v. *Say*) (7); nor to *Laybourn* v. *Crisp* (8), where a custom to have the exclusive right of unloading oysters in the port of London, and to receive a reasonable sum for so doing, was upheld at a trial at bar; nor, in short, to any of the authorities for applying the familiar principle, id certum est quod certum reddi potest, to the maintenance of a custom, which principle was acted upon, though it was not thought necessary to recite it, in *Shepherd* v. *Payne* (9); and the reason of the thing is, as we conceive, in accordance with the authorities. Thus, a custom to pay such or such a measure of corn would be good, and therefore a custom to pay in money the value of that measure of corn must be good; and if to pay the value of a measure of corn, why not to pay the value of any other commodity or advantage capable of estimation. We cannot, therefore, as at present advised, decide against the custom upon this ground.

Thirdly, it was objected that the alleged claim was suicidal in

(1) In *Shepherd* v. *Payne*, 16 C. B. (N.S.) at p. 136; 33 L. J. (C.P.) at p. 161.

(2) In *Bryant* v. *Foot*, Law Rep. 2 Q. B. at p. 173.

(3) Willes, 654.

(4) 6 M. & S. 69.

(5) Ca. temp. Holt, 596.

(6) Law Rep. 2 Q. B. 161, 174.

(7) Willes, at p. 631, n.

(8) 4 M. & W. 320.

(9) 12 C. B. (N.S.) 433; 31 L. J. (C.P.) 297.

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this, that it admits the property in the fishery to be in the corporation, and insists, not upon a right to fish paying the customary fee, as in the case of toll, but upon a right to obtain leave and license to fish upon making such payment.

It was said to follow that the claim admits the power of the corporation to refuse leave, and, by refusing it, to hinder the fisherman from fishing. In other words, the claim admits that the licence is necessary, and the plaintiff is in this dilemma, that either the licence is unnecessary to perfect his right, in which case he can have no cause of action for refusing to grant it, or if he cannot lawfully fish without it, then his claim is a precarious one, and therefore not as of right, because it is founded upon a long series of acts, each of which amounts to nothing more than a right to be permitted to fish granted by the owner of the fishery upon compliance with certain conditions, and every act of fishing was therefore an enjoyment by the leave and license of the corporation, and the system adopted, however orderly and long continued, was a system assented to by the corporation for the more convenient farming of their own fishery by persons fishing from time to time by their leave, and of which those who from time to time reaped the benefit did so by the leave, and, as a consequence, at the will and pleasure of the owners. To found a right upon enjoyment of this description was argued, and we think successfully, to be at variance with first principles. Equally in the case of custom as in that of prescription, long enjoyments in order to establish a right must have been as of right, and therefore neither by violence nor by stealth, nor by leave asked from time to time; and of the latter character was the enjoyment relied upon in this case.

It was insisted for the plaintiff that the custom in this respect resembled that of admittance to a copyhold, which is compulsory on the lord. In that case, however, though the freehold is the lord's the usufruct is the tenant's, and the custom only determines the extent of the enjoyment of the latter. The conveyance, though in form by surrender and admittance, takes effect out of the interest of the tenant, not out of that of the lord. The lord is bound by the custom to perfect by formal proof on the roll of which he, by an incident of the tenure, is the keeper, that which in substance has been perfected by the act of the parties, and his refusal

to admit is an obstruction of the complete transfer from the tenant to the purchaser, not a refusal to allow of the enjoyment of what is the lord's own. And this is not all, because in cases where application has been made, not for admittance, but for a licence to lease, upon the ground of custom that the lord should, under particular circumstances, grant such licence, the Court of Queen's Bench has refused to interfere by mandamus: *Reg.* v. *Hale.* (1) That sort of custom, imposing incidents and creating rights in respect of admitted tenure, therefore, furnishes no analogy favourable to the plaintiff.

We are well convinced of the convenience and the justice of upholding ancient custom when it could have had a legal origin. We are aware that where such origin can be assigned it is not for us to argue upon the particular reasons for the custom, which, however, it would not be difficult to find, so far as the present case goes, in the expediency of conciliating the inhabitants of the river's banks, and the convenience of working the fishery by their hands and watching it by their eyes, reasons which we hope may lead to some settlement of this matter by act of parliament.

But, so far as our judgment in point of law is concerned, being satisfied that the evidence of the claim has failed in the particular already pointed out, we must give judgment for the defendants.

Judgment for the defendants.

Attorneys for plaintiff: *N. C. & C. Milne, for Smythies, Goody, & Son, Colchester.*

Attorneys for defendants: *Kingsford & Dorman, for Turner & Dean, Colchester.*

(1) 9 Ad. & E. 339.

RUTTY *v.* BENTHALL.

1867
April 27.

Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134), *s.* 192—*Composition Deed—Debtor and Creditor—Assent of Creditors before Preparation of Deed—Power of Attorney—Stamp.*

3QB581-2
5E198
17LJ11,12

The assent of creditors to a deed under s. 192 of the Bankruptcy Act, 1861, may be given before the deed is executed or even prepared; all that is necessary is that the deed when drawn up should substantially correspond with the terms of the deed specified in the assent.

The assent is not rendered invalid by the mere fact that the document containing it also professes to impower a third person to execute the deed for the creditor, and is not stamped as a power of attorney,—following *Matheson* v. *Ross* (2 H. L. C. 286).

THE defendant pleaded to a declaration upon the common counts a deed of composition entered into between himself and his creditors under s. 192 of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), by which he covenanted to pay them a composition of 2*s.* in the pound upon the amount of their respective debts, by two equal instalments, at three and six months after registration; the deed to be void unless executed or assented to by the required majority within twenty-eight days from its execution by the defendant, and registered, and it contained a covenant which in substance amounted to a conditional covenant by the creditors not to sue, and a proviso that securities held by creditors should not be prejudiced, but that the composition should be paid only upon the amount of the respective debts after deducting the value of the securities.

At the trial before Willes, J., at the first sitting at Westminster in Easter Term, in order to shew that the deed had been executed or assented to by the required number of creditors, the defendant offered in evidence documents in the following form, signed respectively by creditors:—

"I, the undersigned, creditor of H. Benthall, of &c., do hereby assent to and approve of a certain deed of composition and release made, *or intended to be made*, between the said H. Benthall of the one part, and the creditors of the said H. Benthall of the other part, by which the debtor covenants to pay a composition of 2*s.* in the pound, by two equal instalments of 1*s.* each, at three and six calendar months after the registration of the said deed: and I

hereby authorize E. Ellis, of &c., as my attorney, and in my name and on my behalf to sign, seal, and deliver the said deed. As witness, &c."

It was objected, on behalf of the plaintiff, a non-assenting creditor, that this document amounted to a power of attorney, and should have been stamped as such: but the learned judge, on the authority of *Matheson* v. *Ross* (1), ruled that the assent might be looked at, and the rest rejected.

It also appeared that the deed was not in existence at the time the assents were signed, and it was argued for the plaintiff that the assents were on this account ineffectual, and also that the terms of the assent were too vague and indefinite.

These objections were overruled, and a verdict was taken for the defendant, leave being reserved to the plaintiff to move to enter a verdict for the sum claimed, if the Court should be of opinion that any of these objections ought to prevail.

Lopes moved accordingly. Assuming the case of *Matheson* v. *Ross* (1) to be an answer to the first objection, an assent, to be availing, must be an assent to a deed which has been executed by the debtor and at least some of his creditors, or at all events to one which is in existence at the time. The 192nd section speaks of "a deed or instrument *made or entered into* between a debtor and his creditors, or any of them;" and one of the conditions of its validity is, that "a majority in number representing three-fourths in value of the creditors of such debtor whose debts shall respectively amount to 10*l.* and upwards, shall, before or after the execution thereof by the debtor, in writing assent to or approve of *such deed* or instrument." Then, the assent in question is too vague and indefinite: it refers to no particular deed. The point arose before Mr. Commissioner Hill at Bristol in a case of *Ex parte Williams* (2), where that learned commissioner held that an assent not referring to any particular deed, by date or otherwise, and in terms so vague as to leave the choice of the deed substantially to the debtor, was not a sufficient compliance with the statute. The assent there,—which was addressed to one J. B., an accountant,—was as follows:—"I hereby assent to a deed of assignment and

(1) 2 H. L. C. 286. (2) 15 L. T. (N.S.) 451.

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conveyance to be executed by Mr. J. E. W., of &c., forthwith, to Mr. T. A. and Mr. W. G., and authorize you to execute the same on my behalf in respect of my debt or claim of —*l.*" The learned commissioner said: "The deed executed happens to be an assignment of the debtor's whole property; but the assent would be equally applicable to a deed assigning only a part. Again, the deed contains a clause of release to the debtor; but there is no authority in the form of assent authorizing the deed to be so drawn as to extinguish the debt. A creditor in assenting does not deal merely with his own interests. The legislature has intrusted the interests of all creditors for less than 10*l.* to the creditors for larger amounts: and the interests of the 10*l.* creditors themselves are intrusted to a majority in number and three-fourths in value, but in nowise to the debtor. If, therefore, the form of assent be so vague as to leave the choice of the deed substantially to the debtor himself, I cannot but think that the intentions of the legislature are violated."

[BOVILL, C.J. Does not the assent here point to a specific deed of composition, under which the creditors are to receive 2*s.* in the pound on their respective debts, by two instalments of 1*s.* each, with a covenant not to sue, which in substance amounts to a release?]

The deed is only to become a valid deed when executed by a majority; but here there was no evidence that any of the creditors had executed the deed.

[BOVILL, C.J. Was this point taken at the trial?]

Not in this precise form.

BOVILL, C.J. I am of opinion that there should be no rule in this case. The stamp objection is disposed of by the case of *Matheson* v. *Ross.* (1) Then it is said that the consents were too vague and indefinite, and we are referred to a learned opinion expressed by Mr. Commissioner Hill in a case of *Ex parte Williams.* (2) But it is enough to say that the present case is distinguishable from that; for, here the assent is sufficiently definite, and the deed is in precise conformity with it. The objection that the deed was not proved to have been executed at the time the assents were

(1) 2 H. L. C. 286. (2) 15 L. T. (N.S.) 451.

given, is disposed of by the admission of Mr. Lopes that the point was not taken at the trial. The only remaining question is, whether it is necessary that the deed should be actually in existence at the time the assents are signed. The statute provides that the assent may be given "before or after the execution of the deed by the debtor." The invariable practice, I believe, is, that the deed is executed by the debtor before its execution by any of the creditors. All that is necessary is, that the deed shall substantially correspond with the assent. The mere existence of the parchment unexecuted would amount to nothing. I think the assents here were sufficient and well proved, and therefore that the verdict for the defendant should stand.

BYLES, J. I am of the same opinion; and I only desire to remark upon the question as to the absence of a stamp, that the 31st section of the Common Law Procedure Act, 1854 (1), expressly provides that "no new trial shall be granted by reason of the ruling of any judge that the stamp upon any document is sufficient, or that the document does not require a stamp;" and that this Court, in *Siordet* v. *Kuczynski* (2), held that such a question is to be decided by the judge, and cannot properly be reserved for the opinion of the Court.

KEATING, J., concurred.

MONTAGUE SMITH, J. I also am of opinion that the execution or existence of the deed at the time the assents are given is not essential. The 192nd section provides that the deed shall be binding provided certain conditions are observed. One of those conditions is, that a majority in number representing three-fourths in value of the creditors whose debts shall amount to 10*l.* and upwards shall, *before or after* the execution thereof by the debtor, in writing assent to or approve of such deed. What the legislature contemplated was the approval of the proposed arrangement by the creditors. Most likely it was supposed that there would be a meeting of the creditors and their approval obtained before the serious step of executing a deed by the debtor was taken. Another

(1) 17 & 18 Vict. c. 125. (2) 17 C. B. 251; 25 L. J. (C.P.) 2.

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condition is, that, if a trustee be appointed, the deed shall be executed by him. It may be important to have the assents before such a deed as that is executed.

Rule refused.

Attorneys for plaintiff: *Huson & Parker.*

May 13.

BAKER *v.* PAINTER.

Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134), *s.* 192—*Deed of Composition—Proviso that Deed shall be at an End if Composition not paid when due—Debtor and Creditor—Execution under fi. fa.*

46 B 272

On the 20th of October, 1866, the defendant executed a deed of composition under s. 192 of the Bankruptcy Act, 1861, by which, in consideration of her covenant to pay her creditors a composition of 5*s.* in the pound by two instalments of 2*s.* 6*d.* each, at three and six months respectively from the date of the deed, the creditors covenanted that, if the instalments were duly paid they would accept the composition in satisfaction of their respective debts, and that the deed should be an absolute release to the defendant therefrom; proviso, that, unless and until the instalments of the composition, or some or one of them, should become payable and should not be paid within three days after demand, the creditors should not sue, &c., in respect of their debts; and a further proviso, that, in case the instalments, or any of them, should not be duly paid when due, the deed and the release therein contained should be at an end.

The deed was executed or assented to by the required number and value of creditors, and was duly registered and gazetted, and a certificate of registration was given to the defendant.

On the 28th of February, 1867 (the first instalment, payable on the 20th of January, not having been paid or tendered), the sheriff seized the defendant's goods under a fi. fa. at the suit of the plaintiff, a non-assenting creditor:—

Held, that the deed being by force of the last proviso absolutely void, the certificate of registration was no bar to the plaintiff's execution.

ON the 20th of October, 1866, after the commencement of this action, the defendant executed a deed of composition of that date under s. 192 of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), made between the defendant of the first part, a surety of the second part, and the several creditors of the defendant of the third part, by which, after reciting that the defendant was unable to pay her debts in full, and that her creditors had agreed to accept a composition of 5*s.* in the pound upon their debts, to be secured by the covenant of a surety as therein mentioned, the defendant covenanted with her said creditors that she would pay them

the composition of 5*s.* in the pound upon their several and respective debts, by equal payments of 2*s.* 6*d.* in the pound at the expiration of three and six months respectively from the date of the deed, payment of the first instalment to be made on the 20th of January, 1867; and the surety also covenanted to pay the composition if the defendant should fail to do so. The creditors covenanted with the defendant that if the instalments were duly paid by her at the times above mentioned, they would respectively accept the composition in satisfaction of the whole amount due to them from the defendant, and that thenceforth the deed should operate as and be an absolute release to the defendant from all the debts of her creditors; and that, "unless and until the said instalments of the said composition, or some or one of them, shall become payable and shall not be paid within three days after demand, they the said creditors shall not, nor shall their executors, administrators, or partners respectively, arrest, sue, or proceed at law or in equity, or bankruptcy, or otherwise or elsewhere, against the said defendant, her executors or administrators, either alone or jointly with any other person or persons, or issue or enforce execution or other process against the estate or effects of the said L. B. Painter in respect of the said claims and demands of them the said parties hereto of the third part:" . . . . "Provided always, and it is hereby declared and agreed by and between all parties hereto, that, in case the said instalments or any of them shall not be duly paid when due, then these presents, and the covenant herein contained for the release of the said defendant, shall be immediately, and without any intermediate or preliminary step or proceeding, at an end, and the whole of the said claims and demands of the said parties hereto of the third part, to whom such default in payment shall be made, shall, as to so much thereof as shall then remain unsatisfied, immediately revive and become and be payable; and in such case the said parties hereto of the third part, or such of them as shall not have then received payment in full of the said composition of 5*s.* in the pound, shall be at liberty to sue and proceed for the amount of their said claims and demands then remaining unsatisfied."

On the 26th of October, 1866, the plaintiff obtained judgment by default in this action; and on the 29th a fi. fa. was issued

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thereon, and placed in the hands of the sheriff. On the 6th of November the deed was duly registered and gazetted, and a certificate of registration given to the defendant. The sheriff levied under the fi. fa. on the 28th of February, 1867, the instalment of 2*s.* 6*d.* in the pound payable on the 20th of January not having been paid or tendered.

On the 6th of March, the defendant took out a summons to set aside the execution and levy, as being against the provisions of s. 198 of the Bankruptcy Act, 1861. The summons was heard before Cockburn, C.J., who referred the matter to the Court, directing the sheriff in the meantime to sell and pay the proceeds into court to abide the decision of the Court, unless the defendant gave security for the amount, or agreed to pay the sheriff's possession money until the case should be disposed of.

H. T. Atkinson having obtained a rule calling upon the plaintiff to shew cause why the sheriff should not withdraw from possession, on the ground that the defendant's goods were protected from seizure by the certificate of registration of the deed,

Harston shewed cause. This is not a deed within the contemplation of s. 192 of the Bankruptcy Act, 1861. That section contemplates a deed which shall be an absolute release, and not one which may become void for non-performance of a condition. Here, the release was conditional only upon the due payment of the composition. But even admitting that there is no objection to the form of the deed, the day for payment is long since past, and the deed has therefore become void, and can afford no protection to the debtor. *Cranley* v. *Hillary* (1) shews that the absence of payment or tender of the composition renders the deed absolutely void. It is true, there is a clause in the deed which provides that the creditors shall not sue the debtor until default shall have been made in payment of the composition within three days after demand; but that is overridden by the concluding clause in the deed, which provides that, in case the instalments or any of them shall not be duly paid when due, the deed and the release therein contained shall be absolutely void. If the latter clause does not override the former the deed is unrea-

(1) 2 M. & S. 120.

sonable. A deed, to be a compliance with s. 192 of the Bankruptcy Act, 1861, must not contain unreasonable covenants: *Dell* v. *King* (1), recognised in *Hidson* v. *Barclay* (2); *Latham* v. *Lafone*. (3) In the last case, Kelly, C.B., lays down the rule in very clear terms. "Looking," says his Lordship, "to the general scope of the enactment, I am of opinion that the intention of the legislature was, to leave to the majority of the creditors the decision of all questions of expediency as to the affairs of the insolvent debtor, but to reserve to the courts of law the determination of the reasonableness of their arrangements. (4) The act has, for the first time, conferred on a specified majority of creditors the power to bind the rest by their informally given vote; but the protection of the interests of the remainder is committed to the law; and, before we can hold the deed binding upon non-assenting creditors, we must see that it is not unreasonable in the mode in which it affects them." The unreasonableness of this deed is, that it imposes upon the plaintiff, in the middle of an action, the necessity of making a demand, possibly a personal demand, of the composition.

[BOVILL, C.J. Have you any authority for saying that a deed which makes the composition payable only upon demand is contrary to the provisions of the statute?]

Fessard v. *Mugnier* (5) seems to go that length. At common law it is the debtor's duty to seek his creditor.

[BYLES, J. A personal demand would not be necessary. If a man fraudulently leaves his place of abode or business, for the purpose of avoiding a personal demand, a demand at the place would be sufficient.]

Assuming the provisions to be reasonable, the question still remains, whether the deed is not absolutely avoided by the failure to pay the instalments of the composition at the times prescribed.

[BOVILL, C.J. The deed provides that a composition of 5*s.* in the pound shall be paid, the first instalment of 2*s.* 6*d.* in the

(1) 2 H. & C. 84; 33 L. J. (Ex.) 47.

(2) 3 H. & C. 9; 33 L. J. (Ex.) 273: in error, 3 H. & C. 361; 34 L. J. (Ex.) 217.

(3) Law Rep. 2 Ex. 115.

(4) Upon this subject, see the judgment of the Exchequer Chamber in *Coles* v. *Turner*, ante, Vol. I. pp. 373, 379.

(5) 18 C. B. (N.S.) 286; 34 L. J. (C.P.) 126.

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pound on the 20th of January, 1867. Then the creditors covenant that, if the instalments are duly paid at the times mentioned, they will accept the composition in satisfaction and discharge of their respective debts, and that the deed shall operate as and be an absolute release to the debtor. Then it is provided that, unless and until the instalments of the composition, or some or one of them, shall become payable and shall not be paid within three days after demand, the creditors shall not sue &c. in respect of their respective debts. Then comes another proviso, that, in case the instalments or any of them shall not be duly paid when due, the deed and the release therein contained shall be at an end. If the deed has become void, what answer is it to the plaintiff's execution ?]

H. T. Atkinson, in support of the rule. The whole deed must be taken together; and, so read, the release is absolute unless the debtor makes default in payment of an instalment within three days after demand.

[BOVILL, C.J. There is an express provision that the deed shall be at an end if the instalments are not duly paid. Therefore, assuming the deed to have been a valid instrument originally, at the time the execution was levied it was at an end. The covenant as to the demand may be binding on creditors executing or assenting to the deed.]

The certificate is still in force. If the plaintiff wished to issue execution, he should have applied to the Court of Bankruptcy, under s. 198 of the Bankruptcy Act, 1861.

BOVILL, C.J. The strong presumption is that the deed was never intended to mean anything. Nothing has been paid under it. But, it is unnecessary to say whether it was a good deed or not; for, it is clear that, at the time this execution was levied, the deed had ceased to have any force or validity, consequently the certificate fell with it.

BYLES, KEATING, and MONTAGUE SMITH, JJ., concurred.

Rule discharged.

Attorneys for plaintiff: *Rooks, Kenrick, & Crooks.*
Attorney for defendant: *H. Braddon.*

BANNISTER *v.* BRESLAUER AND ANOTHER. 1867 May 16.

Charterparty—Construction—Proviso for Cesser of Charterer's Liability on Shipment of Cargo—Lien for Freight, Dead-freight, and Demurrage.

By a charterparty for a voyage from London to Antwerp, the cargo was to be loaded and discharged with all dispatch, and freight to be paid in cash on unloading and right delivery; "the charterers' liability on this charter to cease when the cargo is shipped, provided the same is worth the freight on arrival at the port of discharge; the captain having an absolute lien on it for freight, dead-freight, and demurrage, which he, or owner, shall be bound to exercise:"—

Held, that a plea setting out the above condition, and averring "that the cargo was shipped, and that the same was worth the said freight on arrival at the port of discharge, and that thereupon the defendants' liability as charterers upon and under the charterparty ceased," was a good answer to an action by the shipowner against the charterers for delay in loading the vessel in London.

DECLARATION on a charterparty in the ordinary form made between the plaintiff, the shipowner, and the defendants, whereby it was agreed that the plaintiff's ship should, with all convenient speed, proceed to a safe berth in the Thames or dock, and there load from the factors of the defendants a full and complete cargo as therein mentioned, and, being so loaded, should therewith proceed to Antwerp, and deliver the same on being paid freight at 7*s.* per ton delivered. The freight to be paid, on the unloading and right delivery of the cargo, in cash. The cargo to be loaded and discharged with all dispatch. "The charterers' liability on this charter to cease when the cargo is shipped, provided the same is worth the freight on arrival at the port of discharge; the captain having an absolute lien on it for freight, dead-freight, and demurrage, which he, or owner, shall be bound to exercise." 5*l.* per cent. commission to be due on signing the charterparty on the amount of freight, primage, and demurrage to the defendants. There was no further provision respecting demurrage. Averment, that all conditions &c. had been performed necessary to entitle the plaintiff to have the agreed cargo loaded on board the ship in accordance with the terms of the charterparty. Breach, that the defendants did not load the ship with the agreed cargo with all dispatch or within a reasonable time.

Third plea, that the charterparty was made subject to a certain

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condition, that the defendants' liability on the charterparty was to cease when the cargo was shipped (provided the same was worth the freight on arrival at the port of discharge), the captain having an absolute lien on it for freight, dead-freight, and demurrage, which he, or owner, should be bound to exercise; and that the cargo was shipped, and that the same was worth the said freight on arrival at the port of discharge, and that thereupon the defendants' liability as charterers upon and under the said charterparty ceased.

Demurrer and joinder.

Keane, Q.C., in support of the demurrer. By the express terms of this charterparty the liability of the charterers is to cease "when the cargo is shipped," provided the same is worth the freight on arrival at the port of discharge. Reliance will probably be placed by the plaintiff upon the cases of *Oglesby* v. *Yglesias* (1) and *Milvain* v. *Perez* (2); but the language used in the charterparties in those two cases was different from that of the present charterparty. In the first, the charterer's liability was to cease "as to all matters and things as well before as after the shipping of the cargo;" and in the second, the words were "as to all matters and things as well before and during as after the shipping of the cargo;" and in each the defendants entered into the charterparty merely as agents. There is no provision in this charterparty as to what may happen before or during the shipping of the cargo. The obvious meaning is, that the charterers are to be absolved from liability to arise after shipment, not from that which they had already incurred at the time of the shipment. This is clear from the proviso which immediately follows, as to the captain's lien for freight, *dead-freight*, and *demurrage*. The consignee of goods is not liable for the detention of the ship before the bill of lading is signed: *Smith* v. *Sieveking*. (3)

[BYLES, J. The captain is to have an absolute lien at the end of the voyage for freight, dead-freight, and *demurrage*. Does not that include that which the plaintiff is now claiming?]

(1) E. B. & E. 930; 27 L. J. (Q.B.) 356.
(2) 3 E. & E. 495; 30 L. J. (Q.B.) 90.
(3) 4 E. & B. 945; 24 L. J. (Q.B.) 257.

There is no provision for demurrage in the ordinary sense. The freight is to be paid in cash "on the unloading and right delivery of the cargo." What right would the captain have to withhold delivery if the freight were tendered at the port of discharge? The lien is not given in respect of the breach now complained of. In *Oglesby* v. *Yglesias* (1) the liability was one which arose *after* the cargo had been shipped.

J. Brown, Q.C., contrà. The obvious meaning of the stipulation in question in this charterparty is that which is attributed to it in the plea. The intention of the parties in inserting these clauses is, to put the whole settlement of the shipowner's claim for freight, dead-freight, and demurrage upon the consignee of the goods, who in all probability is in most, if not in all, cases the principal of the charterer. This is manifest from the proviso that the assertion of the lien shall be obligatory on the captain or owner. There is no reason why a necessity should be created for two actions,—one against the charterer for detention before shipment; the other against the consignee for demurrage at the port of delivery. *Oglesby* v. *Yglesias* (1) and *Milvain* v. *Perez* (2) are directly in point. In neither of those cases did the charterparty contain an express provision for a lien for demurrage. In the latter the claim arose at the port of loading; and Hill, J., says: "*Oglesby* v. *Yglesias* (1) shews that it was competent to the defendants to stipulate that they should not be liable for anything occurring before, during, or after the shipping of the cargo, provided that they shipped it. In the present case the plaintiffs, admitting that the defendants have shipped the cargo, say that it was shipped too late, not having been shipped in regular turn. The defendants have, however, by plain words in the charterparty, to be construed according to their plain meaning, protected themselves from all liability on that account; and the only person responsible to the plaintiffs is the defendants' foreign principal."

Keane, Q.C., in reply, referred to *Pearson* v. *Göschen.* (3)

BYLES, J. I am of opinion that this is a good plea. This charterparty certainly does not contain so express a stipulation

(1) E. B. & E. 930; 27 L. J. (Q.B.) 356.
(2) 3 E. & E. 495; 30 L. J. (Q.B.) 90.
(3) 17 C. B. (N.S.) 352; 33 L. J. (C.P.) 265.

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protecting the charterers from liability as to matters arising before the shipping of the cargo as is found in *Oglesby* v. *Yglesias* (1) and *Milvain* v. *Perez*. (2) But those cases shew that the giving a lien upon the cargo, and discharging the charterer from all responsibility in respect of the goods, is not unusual. In construing this stipulation, therefore, according to the literal sense of the words, we shall not be introducing anything which is contrary to the custom of merchants. Now, what is the literal meaning of the language of this charterparty? The cargo is to be "loaded and discharged with all dispatch." A liability, therefore, is cast upon the charterers to load the ship without delay. Then comes the stipulation upon which the question arises,— "The charterers' liability on this charter to cease when the cargo is shipped, provided the same is worth the freight on arrival at the port of discharge; the captain having an absolute lien on it for freight, dead-freight, and demurrage, which he, or owner, shall be bound to exercise." The condition has been satisfied, as the cargo on arrival at Antwerp was worth the freight. There was also a lien upon the cargo for other things, including demurrage, which is expressly mentioned, and which, I think, applies to delay in the Thames as well as at Antwerp. For these reasons, I hold the plea to be good.

KEATING, J. Upon the whole I am of the same opinion, though I must confess I have during the argument entertained some doubt. It is true that the words of exemption in this charterparty are less extensive than those in the cases of *Oglesby* v. *Yglesias* (1) and *Milvain* v. *Perez* (2): but it does stipulate that the charterers' liability on the charter shall cease when the cargo is shipped, provided a certain condition is fulfilled, viz. that the cargo is worth the freight on arrival at the port of discharge; and that condition has been fulfilled here. Upon mature consideration, I do not think it is straining the language of the charterparty to say that the charterers meant to free themselves from all liability in respect of which the plaintiff would be obliged to have recourse to an action upon the charterparty. This view is fortified by the circumstances to which my Brother Byles has

(1) E. B. & E. 930; 27 L. J. (Q.B.) 356.
(2) 3 E. & E. 495; 30 L. J. (Q.B.) 90.

referred. I agree, therefore, with the rest of the Court in thinking that the plea is a good one.

MONTAGUE SMITH, J. I also think the plea sufficient. In all these cases, we must arrive at the intention of the parties as well as we can from the language which they have used. This is a mercantile contract, couched in mercantile language; and, though it certainly might have been more precise and specific, I think we may fairly collect from it that it was intended to exempt the charterers from all liability when the cargo is loaded, subject to the condition that "the same is worth the freight on arrival at the port of discharge." The claim now made is undoubtedly made in respect of a liability on the charterparty; and Mr. Keane admits that if it had been a claim for the detention of the ship at the port of discharge, the charterers would be absolved from liability: but he insists that the liability from which they were to be exempted is limited to future breaches, and does not include a claim like this which arose before the loading of the cargo. The word "demurrage" is found in the clause giving the captain or owner an express lien. That seems to me to be applicable as well to delay at the port of loading as at the port of discharge,—especially as I find in the charterparty a provision that the cargo is "to be loaded and discharged with all dispatch." As I read the charterparty, the liability of the cargo to the owner's lien for freight, dead-freight, and demurrage, embraces detention as well at the port of loading as at the port of discharge. I therefore think our judgment must be for the defendants.

Judgment for the defendants.

Attorney for plaintiff: *J. S. Bennett.*
Attorneys for defendants: *G. & W. Webb.*

1867
May 13.

KENT *v.* TOMKINSON.

Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134), *ss.* 192, 198—*Deed of Composition—Execution against Garnishee under Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *ss.* 60, *et seq.*

A deed under s. 192 of the Bankruptcy Act, 1861, is a bar to an execution issued against a garnishee under an order made pursuant to s. 63 of the Common Law Procedure Act, 1854, to the same extent that it is a bar to an execution on a judgment.

On the 15th of March, 1867, a debt due from the defendant to a third person was attached by the plaintiff, under s. 61 of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125). On the 8th of April an order was made on the defendant, as garnishee, to pay to the plaintiff the amount of this debt. On the 28th of April an order was made under s. 63 of the Common Law Procedure Act, 1854, for execution to issue against the defendant, to levy the amount due from him as such garnishee to the plaintiff.

On the 29th of April the defendant duly executed a deed of composition under s. 192 of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), which was assented to by the required number and value of creditors. The deed was duly registered on the 30th of April, and a certificate of registration was given to the defendant on the 4th of May.

On the 2nd of May, at noon, instructions were given by the defendant to insert an advertisement of the execution of the deed in the *London Gazette*, as required by s. 193 of the Bankruptcy Act, 1861. In the evening of the same day the defendant's goods were seized by the sheriff. On the 3rd of May the advertisement was published in the *London Gazette* of that date. On the same day a summons was taken out by the defendant, calling on the plaintiff to shew cause why the sheriff should not withdraw from possession. The summons was heard by Willes, J., who referred the matter to the Court.

A rule having been obtained accordingly,

T. W. Saunders shewed cause, and contended that the provisions of the Bankruptcy Act, 1861, did not apply to the case of an

execution under the garnishee clauses in the Common Law Procedure Act, 1854.

F. Turner, contrà, was not called upon.

BOVILL, C.J. In this case it appears that an order had been made upon the defendant, as garnishee, to pay over to the plaintiff a debt due from the defendant to a third person. The order not having been obeyed, an execution was issued against the plaintiff's goods. Under these circumstances I am clearly of opinion that this was a debt and an execution for a debt within s. 198 of the Bankruptcy Act, 1861.

BYLES, KEATING, and MONTAGUE SMITH, JJ., concurred.

Rule absolute, without costs.

Attorney for plaintiff: *Hewitt.*
Attorney for defendant: *J. Strutt.*

BUCKLAND *v.* TOMKINSON.

In this case the facts and dates were the same as those in *Kent* v. *Tomkinson*, except that the execution was levied under a fi. fa. on a judgment.

May 7. *F. Turner* obtained a rule nisi for the sheriff to withdraw from possession.

Ledgard shewed cause in the first instance.

The Court (Bovill, C.J., Byles, Keating, and Montague Smith, JJ.), on the authority of *Rogers* v. *Roberts* (Law Rep. 2 Ex. 35), directed the sheriff to withdraw.

Rule absolute, without costs.

Attorney for plaintiff: *Hewitt.*
Attorney for defendant: *J. Strutt.*

1867
May 16.

BIEDERMAN *v.* STONE.

Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 131—*Voluntary Winding-up—Contract to sell Shares—Execution of Transfer—Rules of Stock Exchange—Principal and Agent.*

Section 131 of the Companies Act, 1862, provides that whenever a company is wound up voluntarily, the company shall from the date of the commencement of such winding up cease to carry on its business, and that all transfers of shares, except transfers made to, or with the sanction of, the liquidators, taking place after the commencement of such winding up, shall be void.

The plaintiff, a member of the Stock Exchange, sold for the defendant thirty shares in "Overend, Gurney, & Co." after that company had commenced winding up voluntarily. The sanction of the liquidators to the transfer of the shares had not been obtained, and the defendant on that account refused to execute a transfer, and the plaintiff was in consequence compelled, by the rules of the Stock Exchange, to furnish to the buyer other shares, for which he paid an advanced price:—

Held, that, as the statute made the execution of a transfer without the sanction of the liquidators, only void, but not illegal, the defendant was liable to an action for refusing to execute the transfer, and that whether it was the duty of the buyer or of the seller to obtain the required sanction.

First count of the declaration: That the plaintiff was a broker on the Stock Exchange of London, and was employed by the defendant as such broker to sell for the defendant, according to the rules and regulations of the Stock Exchange, thirty shares in a certain company called Overend, Gurney, & Co., at a price then agreed upon; that the plaintiff did sell the shares as ordered by the defendant; yet the defendant did not nor would ratify or complete the sale, whereupon the plaintiff became and was liable, according to the said rules and regulations, to have thirty shares in the said company bought in against him; that the same were accordingly so bought in at a much greater price than the said agreed price; and that the plaintiff, according to the said rules and regulations, became liable to pay and did pay the loss so incurred, &c.

Second count (after stating the employment as in the first count), that the plaintiff, as such broker, made a contract for the sale of the said shares at the agreed price, and thereupon it became and was the duty of the defendant, according to the said rules and regulations, to execute a transfer of the shares to the purchaser thereof, and to complete the said sale; that the purchaser of the

shares was at all times thereafter ready and willing to accept from the defendant a transfer of the shares, and to complete the sale; yet the defendant did not nor would execute a transfer of the shares to the purchaser, nor complete the sale; whereby the plaintiff had become liable to purchase and pay for and had purchased and paid for other shares in the company, and had become liable to transfer and had transferred the last-mentioned shares to the purchaser, in lieu of the shares of the defendant, and had become liable to complete and had completed the sale, and had been put to great costs and charges in so doing.

To the first count the defendant pleaded, sixthly, that the company was during all the times in the first count mentioned a company formed and incorporated, and subject and liable to be wound up voluntarily, under the Companies Act, 1862, and petitions were duly presented to the Court of Chancery for the winding up of the company under the said act; that the company passed a special resolution according to the act, requiring the company to be wound up voluntarily under the supervision of the Court; that the Court afterwards duly made an order for the winding up of the company subject to the supervision of the Court; that the company was during all the times in the first count mentioned being wound up subject to the supervision of the Court according to the act, and the employment took place, and the sale was made, after the petitions, resolution, and order; that the Court did not, nor did any other Court, nor did any official liquidator, at any time order or sanction any transfer of the shares to be made, and no transfer thereof was sanctioned or authorized according to and as required by the act; and that, according to the rules and regulations of the Stock Exchange, or to the terms of the contract of sale, it was not the defendant's duty to obtain from the said Court or any other Court, or from the said or any official liquidator, any order or sanction to a transfer of the shares or any of them,—wherefore the defendant could not make or execute, and did not make or execute, a transfer of the shares, and the defendant's not executing or making a transfer of the said shares was the breach and act complained of.

The fourteenth plea to the second count was similar to the sixth plea.

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BIEDERMAN v. STONE.

Demurrers and joinder.

Hannen, in support of the demurrers. The question raised by these demurrers is, whether the defendant is excused from executing the transfer because the company was in course of winding up *at the time of the contract*. But for that circumstance, the case would be identically the same as those of *Chapman* v. *Shepherd* and *Whitehead* v. *Izod*. (1) The defendants in those cases relied upon s. 153 of the Companies Act, 1862 (25 & 26 Vict. c. 89), as making a transfer of shares between the commencement of the winding-up and the order for winding up absolutely void, unless the Court should otherwise order. But the Court held that the effect of that section, coupled with s. 131, was merely to prevent the transfer from having a legal operation until the court of equity should make an order in the matter, but that there was nothing to prevent the contract from being carried out subject to what might thereafter be done by the Court. Here both parties knew the exact state of things at the time of entering into the contract. The defendant cannot excuse himself from executing the transfer because it may turn out an abortive act.

J. Brown, Q.C. (*E. C. Willoughby* with him), contrà. The case is clearly distinguishable from those referred to. This is not, like those, an action against an unwilling purchaser, but against an unwilling vendor. The contract of sale there was made before the date of the order for winding up the company; and the question turned upon s. 153, which enacts that where any company is being wound up by the Court, or subject to the supervision of the Court, every transfer of shares made between the commencement of the winding up and the order for winding up, shall, unless the Court otherwise order, be void. Here, however, the question turns upon s. 131, which provides that, whenever a company is wound up voluntarily (which is this case), all transfers of shares, except transfers made to or with the sanction of the liquidators, taking place after the commencement of such winding up, shall be void. The pleas in the present case in substance state that the contract for the sale of the shares was entered into after the order for winding up, and urge by way of excuse for the non-performance

(1) Law Rep. 2 C. P. 228.

by the defendant that neither the Court nor the official liquidator sanctioned a transfer. It was the purchaser's duty to get the required sanction before he could call upon the seller to do that which would be a void and nugatory act.

[MONTAGUE SMITH, J. The pleas negative that it was the defendant's duty to obtain the required sanction; but they do not aver that it was the plaintiff's duty to obtain it. Could the purchaser ask for the sanction of the Court or the liquidator before the transfer had been executed?]

The true construction of s. 131 is that the sanction of the liquidator should be given before or at the time of the execution of the transfer. The case may be likened to that of a prohibition in a lease to assign or underlease without the consent of the lessor: there the consent must be obtained before the assignment or underlease is executed. Here the defendant could not be called upon to execute a transfer upon the speculation of an assent being subsequently obtained from the liquidator. In *Chapman* v. *Shepherd* (1) it was probably the duty of the purchaser to obtain the sanction.

[KEATING, J. There is no allegation here that according to the rules and regulations of the Stock Exchange it was the purchaser's duty to get the sanction. Was not the defendant bound to execute the transfer valeat quantum?]

The person who wants a sanction to render a transaction valid must be the person upon whom the duty of obtaining it is cast. The first count does not even allege that the plaintiff was ready and willing to complete the contract, though the second does.

Hannen, in reply. The defendant has entered into a contract to sell and transfer shares subject to the rules and regulations of the Stock Exchange. One of those rules makes it his duty to execute a deed of transfer. Unless there be something illegal in it, he must perform his contract. Whether his execution will operate as a valid and effectual transfer is not the question. There is nothing in the Companies Act, 1862, which requires that the sanction of the liquidator shall be obtained before the seller can be called upon to do all that he can to complete his bargain.

(1) Law Rep. 2 C. P. 228.

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BYLES, J. I am of opinion that the plaintiff is entitled to judgment on these demurrers. The defendant is bound to execute the transfer. There is nothing illegal in it. The statute says that the transfer shall be simply void if the assent of the liquidator to it is not obtained. It may be that it is not the duty of the defendant to obtain such sanction. But at all events he must do that which he has contracted to do. He must execute the transfer valeat quantum. If the assent of the liquidator is obtained it will be operative, otherwise not.

KEATING, J. I am entirely of the same opinion. The employment of the plaintiff by the defendant was to sell the shares, subject to the rules of the Stock Exchange; and I think we must assume that both parties were aware of the condition of this company at the time the contract was entered into. The defendant therefore undertakes that he will sell the shares according to the rules of the Stock Exchange; and it is distinctly averred that, according to those rules, it was the duty of the defendant to execute a transfer of the shares to the purchaser, and to complete the sale. The breach substantially alleged in both counts is, that the defendant did not execute a transfer; and his answer is, "I did not execute the transfer because no assent of the liquidator to the transfer was obtained, and it was not my duty to obtain it." I do not, however, find that the assent of the liquidator is imported into the contract between these parties; nor do I find that there is any illegality in the execution of a transfer without such assent. It is unnecessary to say what will be the position of the plaintiff if he is unable to obtain the assent of the liquidator; but the defendant has contracted to execute a transfer, and he must perform his contract.

MONTAGUE SMITH, J. I am of the same opinion. The first count of the declaration is framed in very loose and general terms, and might perhaps have been objected to as ambiguous. But it has been pleaded to; and the substantial question upon both the pleas which have been demurred to is, whether the defendant was bound to execute a transfer of the shares. The sale was made by the plaintiff on the defendant's account, accord-

ing to the rules and regulations of the Stock Exchange; the second count, which is precise, so avers. Now, it has been held in a great number of cases that persons buying or selling stock or shares through members of the Stock Exchange are bound by the rules which govern the transactions of that body. The defendant, consequently, was bound to execute a transfer of these shares and complete the sale unless there is some rule of law or some statute which would make it illegal for him so to do. This Court has already held, in the two cases which have been referred to, that there is no illegality in contracts of this nature. The only other answer which the defendant has attempted to set up is, that to ask him to execute a transfer of the shares in question is calling upon him to do a nugatory act. This turns upon the meaning of the 131st section of the Companies Act, 1862, which provides that, "whenever a company is wound up voluntarily, the company shall, from the date of the commencement of such winding up, cease to carry on its business, except in so far as may be required for the beneficial winding up thereof; and that all transfers of shares, except transfers made to or with the sanction of the liquidators, taking place after the commencement of such winding up, shall be void." It may be that the defendant's execution of the transfer may not operate as an effectual conveyance of the shares, but it will be a step towards it. This is not like the case put, of a covenant in a lease not to assign without the licence of a lessor. There the term would be gone if the lessee assigned without a licence.

Judgment for the plaintiff.

Attorneys for plaintiff: *Freshfields & Newman.*

Attorneys for defendant: *Coverdale & Co., for Stone & Co., Tunbridge Wells.*

1867
May 1.

In re A MARRIED WOMAN.

Acknowledgment by a Married Woman—Loss of Certificate—3 & 4 Wm. 4, c. 74, ss. 84, 85.

A married woman acknowledged a mortgage deed before a judge, who signed a certificate as required by 3 & 4 Wm. 4, c. 74, s. 84. The certificate was lost before it was lodged with the proper officer of the court for the purpose of being filed:—

Held, that whether a fresh certificate, if given by the judge, would be valid or not, the Court had no power to authorize him to give one.

A MARRIED WOMAN executed a mortgage deed in 1862, and acknowledged it before Williams, J., who made the memorandum, and gave the certificate required by 3 & 4 Wm. 4, c. 74, s. 84. The certificate was never lodged with the proper officer of the Court of Common Pleas as required by s. 85 of the act, but remained in the hands of the solicitor of the mortgagee. After his death the certificate could not be found, though the mortgage deed, with the memorandum signed by Williams, J., upon it, was discovered. The property had not been dealt with in any way since the date of the deed, but the husband had now become bankrupt.

Torr, on behalf of the mortgagee, upon affidavits stating the above facts, applied to the Court to authorize Sir Vaughan Williams (who had subsequently resigned his judgeship) to make a fresh certificate. The deed is of no force until the certificate is filed of record in this court, *Jolly* v. *Hancock* (1): and the mortgagee will therefore be deprived of his rights through no fault of his own unless the Court will aid him. The certificate can be received at any time by leave of the Court, but the difficulty in the present case is that there is no certificate. The memorandum on the deed is a sufficient proof that it was actually acknowledged, and the difficulty is therefore really a technical one.

[Bovill, C.J. Could not the married woman make a fresh acknowledgment of the deed?]

There does not appear to be any authority for such a course.

(1) 7 Ex. 820; 22 L. J. (Ex.) 38.

See Charles Fox L.R. 4 Ch 35. 38, for subsequent proceedings

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IN RE A MARRIED WOMAN.

BOVILL, C.J. We cannot interfere in this matter. We have no power to authorize Sir V. Williams to make a fresh certificate; and it is unnecessary now to decide whether such certificate would be valid or not if he were to make it. The parties must take such steps in this matter as they are advised.

BYLES, KEATING, and MONTAGUE SMITH, JJ., concurred.

Motion refused.

Attorney for the mortgagee: *F. Hatton.*

BRADLEY *v.* CARTWRIGHT AND OTHERS.

May 13.

Devise, Construction of—Technical meaning of "Issue" controlled by Implication from the Context—Rule in Shelley's Case.

Where an estate is given for life, and the remainder to the "issue" is accompanied by words of distribution and by words which would convey an estate in fee or in tail to the issue, the estate of the first taker is limited to an estate for life; and that whether the estate is given in fee to the issue by the usual technical words "heirs of the body," or by implication.

By a will made in 1806, the testator devised lands to his son S. B. for life, with remainder to trustees to preserve contingent uses; and, from and after the decease of S. B., "to the use of all and every the issue, child, or children of the body of S. B. lawfully to be begotten, in such shares and proportions, manner and form, as S. B. by deed or will shall limit, appoint, or devise the said premises;" and, "in default of such issue," to the use of other sons of the testator and their heirs, as tenants in common:—

Held, that S. B. had power to appoint to his children in fee, and that, although there was no gift to the issue or children in default of appointment, they, under the terms of the will, took the same estate as S. B. had power to appoint to them, viz. an estate in fee; and, therefore, that the first taker, S. B., was entitled to an estate for life only, and not to an estate tail.

EJECTMENT for a messuage and hereditaments in the county of Leicester. The following case was stated, under a judge's order, for the opinion of the Court, as to the will of William Bradley, who at the date of the will and thenceforth continuously until his death was seised in fee of the hereditaments in question, except a small piece of land which was allotted after his death.

1. The will was duly made and published on the 6th of October, 1806, and was executed and attested so as to pass freehold estates;

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and by that will the testator devised (amongst others) the hereditaments in question to his wife Alice for her life; and, from and after her decease, he devised the hereditaments in question (except the said allotted piece of land) in the words following:—"Also all that my messuage or tenement, with the appurtenances, situate at Belton aforesaid, and in the occupation of Robert Harvey; and also all that close or ground inclosed lying in the lordship of Belton aforesaid, called or known by the name of The Close between Dams, in the occupation of Thomas Goff; and also all that the other part or share of the close called The Flatts, which part is situate in the lordship of Belton aforesaid; and also all that the other part of the barn at Osgathorpe aforesaid not before disposed of (except and always reserved unto the said James Bradley, his heirs and assigns, at all times for ever hereafter, liberty, privilege, way, and passage for cattle, carts, carriages, and otherwise in and through the other part of the said close called The Flatts, hereinafter limited in use to the said Samuel Bradley, and also liberty and privilege for the owners and occupiers of the said James Bradley's part of the aforesaid close at all times for ever hereafter to water his and their cattle at the watering-place situate in the said Samuel Bradley's part of the aforesaid close, without the let, suit, hindrance, molestation, or disturbance of the said Samuel Bradley, his heirs or assigns); to the use of my said son Samuel Bradley, to hold the said last-mentioned premises (except as aforesaid) to him the said Samuel Bradley and his assigns for and during the term of his natural life, without impeachment of waste; and, from and after the determination of that estate, by forfeiture or otherwise, to the use of R. Thompson and M. Woodhouse and their heirs during the life of the said Samuel Bradley, upon trust to preserve the contingent uses and estates hereafter limited from being defeated or destroyed, and for that purpose to make entries and bring actions as occasion shall require; but, nevertheless, to permit and suffer the said Samuel Bradley and his assigns to receive and take the rents, issues, and profits thereof to his and their own use during the term of his natural life: and, from and after his [Samuel Bradley's] decease, to the use of all and every the issue, child, or children of the body of the said Samuel Bradley lawfully to be begotten, in such shares and proportions,

manner and form, as he the said Samuel Bradley at any time during his life, by any deed or writing to be by him duly executed and attested in the presence of two or more credible witnesses, or by his last will and testament in writing, to be duly executed and attested in the presence of three or more credible witnesses, shall limit or appoint, give or devise, the said premises; and, in default of such issue, to the use of the said John Bradley, William Bradley, and James Bradley [sons of the testator before respectively named in the will] and to their respective heirs and assigns for ever, to take as tenants in common."

2. The will contained specific devises in remainder after the death of the testator's wife of other parts of his real estates unto each of the testator's sons, John, William, and James, for his life, with a power limited to each of them of appointment in favour of his "issue, child, or children," and a gift over in default of such issue to the others of them and their heirs, corresponding with the power of appointment and gift over hereinbefore stated. The part of the close called The Flatts not devised to Samuel Bradley, was included in the hereditaments so as aforesaid devised to James Bradley for life, and subjected to the power so given to him as aforesaid, with such remainder over as aforesaid.

3. The testator died on the 3rd of April, 1810, without having altered or revoked his said will, leaving his said wife and four sons him surviving.

4. For the purposes of this case, the allotted piece of land was to be considered to form part of and to follow the title of the said hereditaments, whereof the testator was seised in fee as aforesaid.

The question for the opinion of the Court was, whether, according to the true construction of the will of the testator, William Bradley, the said Samuel Bradley took an estate tail in the hereditaments in question.

Joshua Williams, Q.C. (*Cave* with him), for the defendants. (1) Under the devise in question, Samuel Bradley took an estate in fee. The gift over is not in default of such appointment, but in default of such issue. Now, it is a clear though technical rule of

(1) In the absence of the plaintiff's counsel, it was arranged that the defendants' counsel should begin.

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law, that a gift to one for life, remainder to his issue, and a gift over in default of such issue, creates an estate tail in the first taker: *Shelley's Case.* (1) The contention on the other side will be that the words "all and every the issue, child, or children of the body of Samuel Bradley," mean "child or children" in the limited sense, and nothing more. But effect must if possible be given to all the words the testator has used. The exception of the rights of way and water would upon any other construction be insensible. The two cases upon which the defendants mainly rely are, *Jesson* v. *Wright* (2) and *Roddy* v. *Fitzgerald.* (3) In the former, a devise to W. (a natural son of the testator's sister) for life, and after his decease to the heirs of his body in such shares and proportions as W. by deed, &c., shall appoint, and, for want of such appointment, to the heirs of the body of W. share and share alike as tenants in common, and, if but one *child*, the whole to such only child, and, for want of *such* issue, to the heirs of the devisor,—was held to vest an estate tail in W. In *Roddy* v. *Fitzgerald* (3) the devise was "to my son W. during his life, and, after his death, to his lawful issue, in such manner, shares, and proportions, as he by deed or will shall appoint, and, for want of such appointment, then to his issue equally, if more than one, and, if only one child, to such child; and, in failure of issue of W., to J.:" and this was held to give the first taker an estate tail by implication, on the ground that where in a devise there is a gift over on general failure of "issue," it is presumed that the word "issue" is used by the testator in the sense of "heirs of the body." In *Earl of Tyrone* v. *Marquis of Waterford* (4), under a devise "to my brother B. and to his children in succession," it was held that B. took an estate tail. Lord Justice Knight Bruce there says: "The word 'children' is a flexible expression, and, according to a correct use of the English language, has more meanings than one. An accurate speaker may, without impropriety, use the term 'children' for the purpose of indicating offspring, or descendants, or posterity, in whatsoever degree." In 2 Powell on Devises, by Jarman, 509, it is said: "The word 'issue' is not less extensive in its import than 'heirs of the body;' it embraces the whole line of

(1) 1 Rep. 93, *b.*
(2) 2 Bligh, 1.
(3) 6 H. L. C. 823.
(4) 1 De G. F. & J. 613.

lineal descendants; it is used in the statute De Donis, 13 Edw. 1, c. 1 (on which estates tail depend), synonymously with 'heirs of the body,' and the cases are very numerous in which it has been held to create an estate tail. We shall do well, therefore, to pause before we place implicit reliance upon any of the cases in which the word 'issue' has been diverted from its general legal acceptation by the mere use of words of distribution, or other expressions introductory of regulations inconsistent with an estate tail, and many of which were decided at a period when a general impression prevailed in the courts that similar expressions would convert the term *heirs of the body* into children." In *Robinson* v. *Robinson* (1) a devise to H. for life and no longer, taking the name of R., and to such son as he should have, taking the name, and, in default of such issue, remainder over, was held to give H. an estate tail. And that decision was affirmed in the House of Lords. (2) There are many cases in which "issue" or "children" have been held to embrace grandchildren or heirs of the body: see *King* v. *Melling* (3); *Haydon* v. *Wilshere* (4); *Horsepool* v. *Watson* (5); *Caulfield* v. *Maguire* (6); *Doe* d. *Blesard* v. *Simpson.* (7)

[MONTAGUE SMITH, J. In *Ryan* v. *Cowley* (8), Lord Chancellor Sugden says: "The term issue may be employed either as a word of purchase or of limitation; but, when the testator adds, provided such child or children shall attain twenty-one, and, for want of such issue, then over, he translates his own language, and clearly shews that he uses the word issue as synonymous with child or children." Many cases to the same effect are referred to in 2 Jarman on Wills, 3rd ed. 419, et seq.]

In the absence of a clear explanatory context to restrain its meaning, "issue" is nomen generalissimum, and includes the whole posterity. That is now settled by the decision in *Roddy* v. *Fitzgerald* (9), notwithstanding some of the expressions in the opinions delivered in that case. Erle, C.J., in that case, refers to the summing up of the authorities as given in the 2nd edition of Jarman

(1) 2 Ves. Sen. 225.
(2) 1 Burr. 38, 52.
(3) 1 Vent. 225.
(4) 3 T. R. 372.
(5) 3 Ves. 383.
(6) 2 J. & Lat. at p. 176.
(7) 3 M. & G. 929.
(8) Lloyd & G. temp. Sugden, 7, 10.
(9) 6 H. L. C. 823.

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on Wills, vol. ii. p. 371 "to shew how this eminent writer understood the law to be settled, and so to remove the objection that this construction will shake titles and unsettle the law, an objection which is a mere petitio principii, assuming that which is to be proved." The passage in question, which will no doubt be relied upon for the plaintiff, is not Mr. Jarman's summing up, but that of the editors. Mr. Jarman, who always considered that "issue" and "heirs of the body" ought to receive the same construction, and whose opinion on this matter has already been referred to in 2 Powell on Devises, which was written by him, took no part in the preparation of the second edition of the work on Wills. *Roddy* v. *Fitzgerald* (1) clearly decides that the technical meaning must be given to "issue" and "heirs of the body," which are most unyielding words, unless the context makes it apparent that they are not used in that sense; or, in the language of Lord Wensleydale (2), "To deprive the technical words of their appropriate sense, there must be sufficient to satisfy a judicial mind that they were meant by the testator to be used in some other sense, and to shew what that sense is." That case was followed in *Sherwin* v. *Kenny* (3), where there is a learned judgment of the Master of the Rolls. *Doe* d. *Cole* v. *Goldsmith* (4) is also an important case. There, the devise was to F. G. and his assigns for his life, and, immediately after his decease, unto the heirs of his body lawfully to be begotten, in such parts and shares as F. G. should by will or deed appoint, and, in default of such heirs of his body, then immediately after his decease over to J. G.: and it was held that F. G. took an estate tail by implication.

Mellish, Q.C., for the plaintiff. Under this devise, Samuel Bradley took an estate for life only, with a contingent remainder to his children in fee. It is now clearly established that, where there are words shewing an intention that the issue shall take as tenants in common, and there are also words sufficient to give a fee to them, the ancestor or first taker takes only an estate for life. No doubt, if there be a devise to A. for life, with remainder to his issue as tenants in common, and there are no words to enable the children to take the fee, and there is a devise over for want of

(1) 6 H. L. C. 823.
(2) 6 H. L. C. 877.
(3) 16 Ir. Ch. Rep. 138.
(4) 7 Taunt. 209.

issue, A. takes an estate tail; for there the testator only intends the estate to go over on a general failure of issue. In *Golder* v. *Cropp* (1), Sir J. Romilly, M.R., says: "I have always considered that where an estate is given to the ancestor, and there is a direction that it is afterwards to go to the issue of his body, and the mode in which the issue are to take is specified, with words added giving them the absolute interest, there the ancestor takes an estate for life, and not an estate tail, although there is a devise over in the event of the ancestor not having any issue. No one can doubt that the word 'issue' is here used as equivalent to 'children.' I am of opinion that the ancestor, M. G., takes an estate for life, and that her issue take as purchasers an estate in fee simple as tenants in common." The words of the devise there were, "to M. for life, and, from and immediately after her decease, unto the issue of her body lawfully begotten, to hold to them and their heirs for ever as tenants in common." The whole law is fully and correctly stated in the opinion delivered by Crompton, J., in *Roddy* v. *Fitzgerald.* (2) "It seems to me," says that learned judge, "that, whether the fee is given directly to the issue as purchasers by apt words of limitation to their heirs, or whether it is given by words implying, according to the rules of law, the intention that they should have the fee, the effect will be the same, as it is the vesting of the fee in the issue, and not the words by which it is vested, that prevents the necessity of implying the estate tail in the parent for the purpose of carrying out the intention that the estate should not go over until the exhaustion of the particular line. Accordingly, I am quite satisfied with the proposition that in such cases no estate tail is to be implied in the parent, but the fee is to be considered as vesting in the issue whether the words giving the fee are direct words of limitation, as 'to the issue and their heirs,' or whether the fee can be held to be vested in them from the use of such expressions as 'estate, &c. &c.,' or by implication from a power to appoint the fee to them." That is precisely the case now before the Court. The opinions of Williams, J., at p. 861, of Lord Cranworth at p. 872, and of Lord Wensleydale at p. 883, are also most important. In *Rex* v. *Marquis of Stafford* (3), one having an only child, Rebecca,

(1) 5 Jur. N. S. 562. (2) 6 H. L. C. at p. 855. (3) 7 East, 521.

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who was married and had three children, Thomas, Rebecca, and Ann, devised his copyholds to Rebecca his daughter for life, remainder to his granddaughter Rebecca for life, remainder to trustees to preserve contingent remainders, remainder to the use of the *issue of the body* of his granddaughter Rebecca in such parts, shares, and proportions, *manner and form*, as she should by deed or will appoint; and, in default of appointment, to the use of all and every the *children* of his said granddaughter and *their heirs*, as tenants in common; and, *in default of such issue*, to the use of all and every the other children of his daughter Rebecca and their heirs, as tenants in common, &c.; and, in default of such issue, to his own right heirs: and it was held that, upon the death of the testator's daughter and of his granddaughter Rebecca, without any appointment, an only child of the latter took an absolute fee. In *Lambert* v. *Thwaites* (1), Kindersley, V.C., says: "The general principle seems to be this: If the instrument itself gives the property to a class, but gives a power to A. to appoint in what shares and in what manner the members of that class shall take, the property vests, until the power is exercised, in all the members of the class, and they will all take in default of appointment; but, if the instrument does not contain a gift of the property to any class, but only a power to A. to give it as he may think fit among the members of that class, those only can take in default of appointment who might have taken under an exercise of the power. In that case the Court implies an intention to give the property in default of appointment to those only to whom the donee of the power might give it." The rule is distinctly recognised that, if the issue take the fee, the first taker has an estate for life only. In the 3rd edition of Jarman on Wills, at pp. 416, 417,—after commenting upon several cases, and, among them, *Crozier* v. *Crozier* (2), *Greenwood* v. *Rothwell* (3), *Montgomery* v. *Montgomery* (4), *Harrison* v. *Harrison* (5), *Slater* v. *Dangerfield* (6), *Kavanagh* v. *Morland* (7), and *Roddy* v. *Fitzgerald* (8), the editors deduce from them the following propositions, which clearly establish that for

(1) Law Rep. 2 Eq. at p. 155.
(2) 3 Dr. & W. 373.
(3) 5 M. & G. 628.
(4) 3 J. & Lat. 47.
(5) 7 M. & G. 938.
(6) 15 M. & W. 263.
(7) Kay, 16; 23 L. J. (Ch.) 41;
(8) 6 H. L. C. 823.

which the plaintiff contends here:—"First, where words of distribution, but without words to carry an estate in fee, are annexed to the devise to the issue, and there is a gift over in default of issue of the ancestor generally, or in default of such issue, or in default of issue living at the death of the ancestor, the ancestor takes an estate tail. As to the truth of this proposition, the cases seem to admit of no reasonable doubt, and it appears to be immaterial that between the gift to the ancestor and that to the issue there is a limitation to trustees to preserve contingent remainders. Secondly, where the gift is as in the last proposition, but there is no gift over in default of issue, still, since the issue taking by purchase could only take for their lives, the ancestor is held to take an estate tail, which, if not barred, will descend to his issue, this being the only mode of carrying the inheritance to the issue. Thirdly, where words of distribution, together with words which would carry an estate in fee, are attached to the gift to the issue, the ancestor takes an estate for life only; and the result is the same whether the fee is given by the technical words 'heirs and assigns,' or by such words as 'estate,' 'part,' 'share,' &c., occurring in the description of the subject of the gift, or words imposing a pecuniary charge upon the issue, and whether the gift to the issue be direct or by implication from a power to appoint to them, and whether there is a gift over on general failure of the issue or not; and the same rule applies where the issue would take an estate tail." The question for the Court here is whether that is a correct exposition of the law, and whether there is in this will such an implication of an estate in fee in the children of Samuel Bradley. All the earlier law is discussed by Lord St. Leonards in *Montgomery* v. *Montgomery*. (1) *Crozier* v. *Crozier* (2) is also a most important case. In *Kavanagh* v. *Morland* (3) it is laid down that, though the word "issue" is primâ facie equivalent to "heirs of the body," the Court leans against so construing it when there are other expressions in the will to control that meaning; and that, if words of limitation be superadded, as, a gift to "issue and their heirs," the issue take as purchasers in fee simple, and a gift over on a general failure of issue operates nothing. In none

(1) 3 J. & Lat. 47. (2) 3 Dr. & War. 373.

(3) Kay, 16; 23 L. J. (Ch.) 41.

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of the cases relied on for the defendants were there words enough to carry a fee to the issue.

Joshua Williams, in reply, admitted that the rule contended for by the plaintiff was well founded where there was an express limitation to the issue, their heirs and assigns; but contended that a mere implication would not suffice, and that the fair result of all the authorities was that Samuel Bradley took under the devise in question an estate tail. He also referred to *Doe* d. *Blandford* v. *Applin* (1), *Tate* v. *Clarke* (2), *Greenwood* v. *Rothwell* (3), *Harrison* v. *Harrison* (4), *Ex parte Wynch* (5), and *Woodhouse* v. *Herrick*. (6)

Cur. adv. vult.

May 13. The judgment of the Court (Bovill, C.J., Byles, Keating, and Montague Smith, JJ.) was delivered by

BOVILL, C.J. We have taken time to consider our judgment in this case, not from any doubt that was entertained by any member of the Court, but in order that we might more carefully examine some of the authorities which were cited in the course of the argument: and the result of such examination and the further consideration of the case has confirmed us in the view that Samuel Bradley took an estate for life only, and not an estate tail, under the limitations of this will.

We quite concur in the first part of the argument of the learned counsel for the defendants, that the word "issue" must primâ facie be taken to be used in its ordinary sense, embracing all future descendants, and be construed as a word of limitation of the inheritance, equivalent to the technical expression "heirs of the body." But it was further contended on the part of the defendants that there was not to be found in the rest of the language of this will sufficient grounds for controlling the usual and technical meaning of the word "issue."

In addition to the cases of *Jesson* v. *Wright* (7) and *Robinson* v.

(1) 4 T. R. 82.
(2) 1 Beav. 100.
(3) 5 M. & G. 628.
(4) 7 M. & G. 938.
(5) 5 De G. M. & G. 188, 210,
(6) 1 K. & J. 352.
(7) 2 Bligh, 1.

Robinson (1), the cases of *Roddy* v. *Fitzgerald* (2), in the House of Lords, and *Sherwin* v. *Kenny* (3) before the Master of the Rolls in Ireland, were mainly relied upon by the defendants in support of this view. So far as the general proposition deducible from these is concerned, for which the defendants contended, it was scarcely controverted by the learned counsel for the plaintiff: and he relied principally upon the distinction that, where an estate is given for life, and the remainder to the issue is accompanied by words of distribution and by words which would convey an estate in fee or in tail to the issue, the estate of the first taker is limited to an estate for life, and is not an estate tail. In support of that view he strongly relied upon the principles laid down in the case of *Roddy* v. *Fitzgerald* (2), and especially upon the law as stated there by several of the learned judges who were in favour of an estate tail having been created under the terms of the will in that case. He further contended that this would be the result, whether the estate was given in fee to the issue by the usual technical words, or by implication; and that there was such an implication in the present case.

The first part of this contention was scarcely denied by Mr. Williams on the part of the defendants: but he insisted that the fee must be limited to the issue by *express* words, and that it would not be sufficient that it should pass to them by *implication* from the terms of the will.

It is quite true that, previously to the decision of the case of *Montgomery* v. *Montgomery* (4) and some of the other cases cited by Mr. Mellish, several cases had been decided, to which our attention was called by Mr. Williams in his reply, in which the first taker was held to take an estate tail, although words had been used in the will which might by implication have been construed to give an estate in fee to the issue: but, in none of those cases was the distinction made, or the point as to the effect of those words either raised or decided. Indeed, Mr. Williams contends it was a new point, not suggested by Mr. Jarman himself, and that it was introduced into the later editions of Mr. Jarman's book for the first time by the learned editors of that valuable work.

(1) 11 Beav. 371.
(2) 6 H. L. C. 823.
(3) 16 Ir. Ch. Rep. 138.
(4) 3 J. & Lat. 47.

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It appears to us, that, so far as it is applicable to this case (and it is not necessary to examine it further), the rule has been correctly laid down in the 3rd edition of Jarman on Wills, at p. 437. And we are of opinion that, where words of distribution, together with words which would carry an estate in fee, are attached to the gift to the issue, the ancestor takes an estate for life only; and that the result is the same whether the fee is given by the usual technical words or by implication.

The rule to which we have adverted as laid down by the learned editors of Jarman was not stated as a mere speculative opinion of their own, but as being in their opinion the result of the decisions, including the cases of *Montgomery* v. *Montgomery* (1) and *Roddy* v. *Fitzgerald*. (2) And we think they have correctly appreciated and stated the rule which consistently with those decisions ought now to prevail.

The case of *Montgomery* v. *Montgomery* (1), decided by Lord St. Leonards, is of the highest authority upon this point, and has in our opinion a most important bearing upon the rule as we have stated it, and a most material effect upon the decision in the present case. In that case it was held that the testator, by devising his *part* of certain lands to the "issue," "share and share alike," must be taken to have intended to pass the fee to them, and that the previous devise to the son was therefore to be considered as a devise for life only.

If the rule be as we have stated it, we think that it is applicable to the present case. The terms of the power of appointment empowering Samuel Bradley to appoint to *all and every the issue, child or children* of his body, in such shares and proportions, *manner and form*, as he should think fit, would in our opinion entitle Samuel Bradley to appoint to his children in fee: and, although there is no gift to the issue or children in default of appointment, we think that such issue or children would under the terms of the will take the same estate as Samuel Bradley would have power to appoint to them, viz. an estate in fee. The present case, therefore, in our opinion comes within the rule that under such circumstances the first taker would be entitled to an estate for life only.

In the case of *Roddy* v. *Fitzgerald* (2) the express devise over

(1) 3 J. & Lat. 47. (2) 6 H. L. C. 823.

to the issue in default of appointment under the power gave them an estate for life only, and excluded any such implication as we think arises in this case. But, if there had not been such an express devise over to the issue, and which in legal effect was a devise to them for life only, we do not doubt that the learned judges who thought that in that case there was an estate tail in the first taker, would have come to a different conclusion, and agreed with those who thought that, even in that case, the first taker was entitled for life only. The case of *Sherwin* v. *Kenny* (1) we think is distinguishable on the same ground.

Admitting fully the general effect that is to be given to the word "issue," it is yet liable to be controlled, if a contrary intention is to be collected from the terms of the will, and if it can be shewn to have been used in a less extended sense; and looking to the whole of this will, and to the rules that have been laid down for ascertaining and for carrying into effect the intention of testators in the construction of wills, we think that in this case the words "issue, child, or children," and the subsequent mention of "issue," when read in connection with the context, must be taken to have been used in the sense of "children," and to be words of purchase.

We may also mention the case of *Jordan* v. *Adams* (2), in which the words "heirs male of the body" were held to be restricted to "sons," by reason of a subsequent reference to "their father:" and in every case, however general the words may be, they may be restrained and limited by the context, whenever it clearly appears that they were intended to be used in a more restricted sense.

In the construction which we have adopted, no violence is done to the intention of the testator so clearly expressed, that Samuel Bradley was to take for life only; and it is consistent with, and carries into effect what we consider to have been, the general intention of the testator as conveyed by the language of the will, that the estate was to vest in the children of Samuel Bradley in fee, in default of appointment by their father. It is only from the necessity of the case, and in order to effectuate the intention of a testator, that

(1) 16 Ir. Ch. Rep. 138.

(2) 6 C. B. (N.S.) 748; 29 L. J. (C.P.) 180; in error, 9 C. B. (N.S.) 483; 30 L. J. (C.P.) 161.

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the estate is not to go over until the failure of all future generations, that an express devise for life only is held, by the application of the rule in *Shelley's Case* (1), to become an estate tail: but for the reasons we have stated, we think that no such necessity exists in this case, and that there is an implied gift to the "issue," in the sense of "children," in fee.

The intention which the testator has clearly expressed that Samuel Bradley should take for life only, and the intention, which must be implied, that the issue or children were to take distributively in fee, will then be carried out consistently with the rules of law, and in conformity with the decisions and the principles upon which those decisions rest.

The construction contended for by the defendants would, as between the children, have given the estate to the eldest son in preference to the rest, destroying the power of appointment, and practically giving Samuel Bradley (by enabling him to cut off the entail) the absolute power over the property, and would thus in our opinion be entirely contrary to the intention of the testator, as we collect it from the language of the will.

For these reasons we give our judgment for the plaintiff.

Judgment for the plaintiff.

Attorneys for plaintiff: *Davidson, Carr, & Bannister.*

Attorneys for defendants: *Williamson, Hill, & Co., for Woolley, Loughborough.*

(1) 1 Rep. 93, b.

GREEN, ASSIGNEE OF W. VERITY, A BANKRUPT *v.* INGHAM. 1867 *May* 17.

Bankrupt—Order and Disposition—Chose in Action—Assignment of Policy of Insurance on Bankrupt's Life, without Notice to the Office.

A. delivered to B. a policy of insurance on his own life, to secure a loan from B., with the intention of giving B. an interest in the sum insured. No notice of the transaction was given to the insurance office:—

Held, that the policy remained in the order and disposition of A., and that, on his bankruptcy, his assignee was entitled to recover it from B.

Gibson v. *Overbury* (7 M. & W. 555) distinguished.

DETINUE by the plaintiff, creditors' assignee of William Verity, a bankrupt, for a policy of assurance effected on the life of the bankrupt in The English Widows' Fund and General Life Assurance Association, for 300*l.*

The defendant traversed the detention of the policy and the plaintiff's property in it, and for a third plea alleged that before Verity became a bankrupt, and before the detention in the declaration mentioned, the policy was the property of Verity, who, being indebted to the defendant in a sum which the defendant had before then lent to him, agreed with the defendant that he should hold the policy as a pledge and security to secure the payment of a sum to the defendant; that Verity, in pursuance of the agreement, thereupon, and before his bankruptcy, deposited the policy with and delivered it to the defendant, to be by the defendant held as such pledge; and that thence and until and at the time of the detention of the policy in the declaration mentioned, the defendant, under and according to the terms of the agreement and deposit, had held and still held the policy as such pledge and security as aforesaid, to secure payment of the said sum, which still remained unpaid, &c. Issue thereon.

Under a judge's order, pursuant to the Common Law Procedure Act, 1854, the following case was stated for the opinion of the Court:—

1. The defendant is a dyer and finisher at Bradford, in Yorkshire, and at the time of the transaction hereinafter mentioned Verity was a worsted-spinner at Dudley Hill, near Bradford.

2. Some time before the 24th of April, 1865, the defendant and Verity had had various business transactions together.

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3. By a policy of the 18th of October, 1858, Verity effected an insurance on his own life for 300*l.* with The English Widows' Fund and General Life Assurance Association.

4. Verity paid all the premiums which became due in respect of the policy to the 24th of April, 1865.

5. On the 24th of April, 1865, Verity (as the defendant alleged) applied to the defendant for a loan of 100*l.*, to be returned in a short time. The defendant made the advance, taking as a security Verity's promissory note for 100*l.*, payable on demand, with 5 per cent. interest. Not being satisfied with this security, the defendant a few days afterwards pressed for payment, whereupon Verity proposed to let him have the policy as an additional security. No memorandum in writing was (as the defendant alleged) given on the delivery of the policy to the defendant, and it was verbally arranged between him and Verity that the policy was to be held by the defendant *as further security.* (1)

6. The defendant also alleged that, shortly after the delivery of the policy by Verity to him, and without any solicitation or request on his part, Verity left with the defendant a sold note referring to the policy, as follows :—

"Bradford, April 24th, 1865.

"Mr. Ingham, Bought of W. Verity,

"Life Assurance policy of 300*l.*, for 100*l.* cash.

"Settled same day,

"100*l.* "W. Verity."

The bankrupt, on being examined on the 1st of February, 1866, in the Bankruptcy Court at Leeds, alleged that he sold the policy to the defendant for the 100*l.*, and that he gave the above-mentioned document at the time. The defendant was not present at this examination, nor had he any notice that such examination was to be taken or the matter inquired into. The above document was duly stamped with a 1*d.* receipt stamp; and the promissory note set forth in par. 5 is properly stamped as a promissory note. The defendant retained possession of the promissory note, policy,

(1) The case did not state when the policy was handed over; but it was admitted to have been some time between the 24th of April and the 15th of May.

and sold note, and has them still; and, when the policy was demanded of him, he said he should not give it up, but should send the papers shewing his right to it down to his attorney, to whom the plaintiff was to apply. The plaintiff's clerk applied accordingly, and the policy, promissory note, and sold note were produced, and again subsequently to the plaintiff himself. The plaintiff alleges that no statement was ever made before this case was drawn up, long after such production, that the policy and sold note had been left as the defendant now alleges; and the defendant alleges that he never gave any explanation to the plaintiff, because he was never asked.

6. The bankrupt was indebted to several persons, and amongst others to the plaintiff, who both before and after the 24th of April had threatened him with proceedings, and had on the 12th of May issued a writ and a notice in bankruptcy against Verity.

7. On the 15th of May, 1865, Verity was adjudicated a bankrupt on his own petition; and on the 29th of May the plaintiff was appointed creditors' assignee. The commissioner acting in the matter had made an order giving the plaintiff leave to sue, under s. 153 of the Bankruptcy Act, 1849 (12 & 13 Vict. c. 106); and an order had also been made under s. 125. This order was made in the absence of the defendant; and no opportunity was given to him to oppose the making of it; nor was any notice given to him of the plaintiff's intention to apply for it.

8. Verity is still living; and the policy has, since the 24th of April, 1865, been kept up and the premiums paid by the defendant; but no notice has ever been given by Verity or the defendant of the above-mentioned dealings with it to the insurance company or to any person or persons on their behalf. There was a demand and refusal before action. The Court were to be at liberty to draw all inferences of law and fact.

The question for the opinion of the Court was, whether the plaintiff, as assignee, was entitled to the possession of and to recover from the defendant the policy, or the piece of paper, or its value, and what, if anything, for its detention. If the Court should be of opinion in the affirmative, judgment was to be entered for the plaintiff for the policy, or what the Court should fix as its value, and what the Court should think fit for its detention, with

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costs. If the Court should be of opinion in the negative, judgment of non-pros. was to be entered, with costs.

Quain, Q.C., for the plaintiff. The facts disclose a sale or an assignment of the policy to the defendant; and, no notice having been given to the office, it was clearly in the order and disposition of the bankrupt at the time of his bankruptcy, viz. on the 15th of May. In all cases of assignment of a debt there must be notice to the debtor in order to complete the transaction and pass the interest: *Edwards* v. *Martin* (1); *In re Webb's Policy.* (2) In the former of these cases policies of insurance were deposited with bankers as security for a debt; the bankers gave no notice to the office; and, the assured having become bankrupt and died, it was held, on a bill by the assignees, that the policies remained in the bankrupt's order and disposition, and that his assignees were entitled to the proceeds, less the premiums paid by the bankers, although the secretary of the office was casually made aware of the fact of the deposit. The same doctrine was recognised in *Re Webb's Policy.* (2) The defendant will no doubt rely upon a case of *Gibson* v. *Overbury* (3), where a distinction was taken for the first, and it is believed the last, time between the instrument itself and the debt it professes to secure, and it was held that trover would not lie for the paper. Lord Abinger there says: "Various cases have been decided in equity, the authority of which we do not dispute, and which shew that where an equitable assignment of an interest has been contemplated, but there has been no notice to the debtor, the instrument is supposed to remain in the hands of the party making such equitable assignment. The present case does not at all contravene those cases, but is consistent with them. Suppose there had been an assignment in writing of this policy to secure the debt, but no notice given to the office, then it would fall within several of the cases, and particularly within those decided before the Vice Chancellor (Shadwell), and reported in 2 Simons (4), that there had been no equitable transfer, because it was not contemplated, and that the instrument remained in the possession of

(1) Law Rep. 1 Eq. 121.
(2) Law Rep. 2 Eq. 456.
(3) 7 M. & W. 555.
(4) *Williams* v. *Thorp*, 2 Sim. 257, and *Ex parte Colville*, 2 Sim. 570, n.

the bankrupt, notwithstanding the intended transfer; and, if it was not complete in equity, then the assignees would not be divested of their right to recover. But, in the case of a mere lien from a deposit by the bankrupt, I believe there is no example of the assignees having been held entitled to maintain trover." In the present case, however, there was not a mere deposit of the paper by way of lien; but the facts shew an intention to confer upon the depositary an interest in the fund. In the course of the argument *Ex parte Burton* (1), *Ex parte Monro* (2), *Buck* v. *Lee* (3), and *Dean* v. *James* (4), being cited, Parke, B., says: "Those were cases of assignment: here, the defendants contemplated nothing more than the taking a deposit of the instrument as a security for their advances." *Gibson* v. *Overbury* (5), therefore, which appears to be inconsistent with the decision of the Queen's Bench in *Belcher* v. *Campbell* (6), does not govern the present case; for, even taking the defendant's own version of the transaction, this clearly was intended to be an assignment of an interest, and not a mere deposit, as in that case.

[MONTAGUE SMITH, J., referred to *Broadbent* v. *Varley*. (7)]

Kemplay, for the defendant. Whatever may be the rights of the parties to the money which may become payable under the policy, the defendant is clearly entitled to retain the paper itself. The supposed distinction between a sale or assignment of the thing and a deposit by way of lien is unintelligible; in either case, the action must be brought in the name of the pledgor or his assignees. It is impossible now to dispute the cases in equity (which have been followed at law), that a chose in action is within s. 125 of the 12 & 13 Vict. c. 106, though it is difficult to see the principle upon which they proceeded. None of the cases referred to deal with anything but the chose in action. If the instrument is handed over on a good and valid title, it is a chattel not in the order and disposition of the bankrupt. *Belcher* v. *Campbell* (6) is a totally different case in its facts from the present. The action was not for the note which had been originally deposited, but for the bills of exchange

(1) 1 Gl. & J. 207.
(2) Buck, B. C. 300.
(3) 1 Ad. & E. 805.
(4) 1 Ad. & E. 809, n.
(5) 7 M. & W. 555.
(6) 8 Q. B. 1.
(7) 12 C. B. (N.S.) 214.

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given in substitution for it: the right to these was clearly in the assignees. The observations of the Court in *Gibson* v. *Overbury* (1), in so far as they are at variance with the present argument, were extrajudicial. It is incumbent on the plaintiff to shew beyond all reasonable doubt that the instrument was in the hands of the defendant under such circumstances as to disentitle him to retain it as against the assignee. That he has not done. There is no statement in the case that the defendant adopted the sale.

[KEATING, J. But he retained the policy and the note. If he did not take the security of the debt, why did he pay the premiums?]

Quain, Q.C., was not called upon to reply.

BYLES, J. I am of opinion that the plaintiff is entitled to our judgment. The decision in *Gibson* v. *Overbury* (1), when examined, amounts to this, that, if the policy is deposited without any intention that the person with whom it is deposited should have conferred upon him an equitable right to recover the money payable thereunder, but only with the intention of giving him a dry interest in the paper, such deposit does not fall within the principle applicable to an assignment of a debt, and the instrument so deposited is not in the order and disposition of the bankrupt at the time of the bankruptcy, within the provision in the Bankruptcy Act; but that, if the deposit were made upon an agreement that the depositee should have conferred upon him a right to the money, then as the debt would pass to the assignee, so the paper which is the title-deed to the debt, would pass to him also. That being, as I understand it, the result of the decision in *Gibson* v. *Overbury* (1), we have to decide, as a matter of fact, what was the intention of the parties here. Independently of the subsequent sale relied on by the plaintiff, the inference I should draw from the facts stated is, that it was intended that an interest in the debt should be given to the defendant: but the sale note puts the matter beyond all question. Allowing, therefore, full effect to the case of *Gibson* v. *Overbury* (1), the present case does not fall within it. But the grounds of that decision afford strong arguments in favour of the plaintiff here.

(1) 7 M. & W. 555.

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KEATING, J. I am of the same opinion. We have no intention by our decision here to interfere in any way with *Gibson* v. *Overbury*. (1) Mr. Kemplay has strongly urged that, for the purposes of this case, there cannot be any sound distinction between a deposit of the paper and a transfer to the depositee of an interest in the debt. But for the case of *Gibson* v. *Overbury* (1), there might have been much force in his argument: that case, however, has decided that there is that distinction; and, if this had been a dry deposit of the policy, independently of any transfer of or charge upon the debt, we must have held ourselves bound by it. It seems to me that the facts here stated take the case out of the operation of that decision, and place it within the distinction there relied on; because nobody can doubt that it was intended here, not to make a mere deposit of the paper, but to give the defendant an interest in the debt secured by the paper.

MONTAGUE SMITH, J. I am of the same opinion. The Court of Exchequer has decided, in *Gibson* v. *Overbury* (1), that, where a policy is deposited with the intention of conferring a lien upon the instrument only, and not with the intention of passing any interest in the debt, the assignee is not entitled to it as being in the possession, order, and disposition of the bankrupt as reputed owner, with the consent of the true owner, though no notice of the deposit has been given to the office. The decision, however, is based on that ground, and on that alone. But it is plain that the decision would have been otherwise if the policy had been handed over with the intention of giving the party a claim to the money. Holding that it was deposited by way of lien only, the Court decide in favour of the depositary. That being so, *Gibson* v. *Overbury* (1) would govern this case in favour of the assignee, if we came to the conclusion upon the facts, that, when he deposited the policy in question with the defendant, the bankrupt did not intend to give him a mere lien upon it, but to give him an interest in the fund. The conclusion I feel bound to come to is, that it was intended that the defendant should have a security on the fund. He received the policy, and afterwards took and retained the paper purporting to be a sale note. Clearly there was a sale of the policy, conditional probably, and to

(1) 7 M. & W. 555.

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be void if the money were repaid. Either way, however, it affords strong evidence to shew that the fund was intended to be dealt with. If so, the case is taken out of the principle of *Gibson* v. *Overbury* (1), and falls within the long current of decisions, that the chose in action, unless notice be given, passes to the assignees, and that the paper passes as accessory to the debt. There are many cases where a lien upon an instrument may exist without conferring any interest in the thing represented by it; as, for instance, in the case of an attorney's lien on papers, title-deeds, and other valuable documents in his hands, which confer upon him no interest in the estates. Upon the whole, I think the plaintiff is entitled to judgment.

Judgment for the plaintiff.

Attorney for plaintiff: *M. K. Braund, for J. Green, Bradford.*

Attorney for defendant: *H. B. Clarke, for Terry & Watson, Bradford.*

May 17.

DELANY AND ANOTHER *v.* THE METROPOLITAN BOARD OF WORKS.

Metropolis Management Amendment Act, 1862 (25 & 26 *Vict. c.* 102), *s.* 106—*Limitation of Action—Claim of Compensation for Injury to Property.*

3 C P 630

By s. 106 of the Metropolis Management Amendment Act, 1862, no action or proceeding shall be commenced against the Metropolitan Board of Works for anything done or intended to be done under the powers of that board, under certain statutes, until after one month's notice, and "every such action and proceeding shall be brought or commenced within six months next after the accrual of the cause of action or ground of claim or demand, and not afterwards":—

Held, that notice of claim and demand of arbitration for damage done to buildings by the Metropolitan Board of Works, acting under their statutory powers, is not such a proceeding against the Metropolitan Board of Works as to render it necessary that it should be made within six months after the damage is caused.

affd in Exch. 3 C P. 111

DECLARATION, after stating that the defendants had, in exercise of the powers contained in their acts of parliament, constructed a certain sewer, and that, by reason thereof, and of the works done by them in connection therewith, the defendants had caused

(1) 7 M. & W. 555

certain land and buildings in the occupation of the plaintiffs to settle and sink, whereby the said land and buildings were damaged and injuriously affected, alleged that the plaintiffs, in pursuance of the statute in that case made and provided, gave notice to the defendants that they required the defendants to pay compensation in respect of the said land and buildings damaged and injuriously affected as aforesaid, and that the claim of the plaintiffs amounted to 400*l.*, and stating the nature of the plaintiffs' interest therein, and that the plaintiffs desired the claim and amount of compensation, in case the same were disputed, to be settled by arbitration, and requesting the defendants to appoint an arbitrator; that the defendants and plaintiffs agreed that the question of the amount of compensation (if any) to which the plaintiffs should be entitled in the premises should be referred to an arbitrator, and that he should have all the powers necessary under the statute or statutes in that behalf, and that the agreement should be taken as made under the Lands Clauses Consolidation Act, 1845, and other the statutes in that behalf. The declaration then alleged that the arbitrator made and published his award, and thereby found that the premises of the plaintiffs were injuriously affected by the works of the defendants, and that the plaintiffs were entitled to compensation in respect of the premises to the amount of 89*l.* Breach, nonpayment of the sum awarded.

Plea, that the said proceedings for obtaining compensation in the declaration mentioned were not brought or commenced within six months next after the accrual of the ground of claim or demand in respect of the alleged damage to and injuriously affecting of the land and buildings in the declaration mentioned, nor did the ground of claim or demand accrue within six months before the giving of the notice to the defendants that the plaintiffs required the defendants to pay the plaintiffs compensation in respect thereof; and that the notice was the first proceeding taken by the plaintiffs towards ascertaining and recovering the amount of the compensation claimed by them as aforesaid.

Demurrer and joinder.

Mellish, Q.C. (*Waddy* with him), in support of the demurrer. The question which arises upon this demurrer is, whether

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s. 106 (1) of the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), applies to claims for compensation for injuries to property through the carrying out of public works, or is confined to actions and proceedings of a hostile character. A claim for compensation is not a proceeding against the board, but is in the nature of an assessment of the amount due to the claimant as a compensation for damage which he has sustained through the construction of a public work by the Metropolitan Board.

Raymond, contrà. The plea in substance states that the notice requiring compensation was the first proceeding taken by the plaintiffs towards ascertaining and recovering the amount of compensation they were entitled to, and that such notice was not served upon the board until more than six months after the ground of claim arose. Section 110 enacts that the recited acts and that act are to be construed together as one act. The board were empowered to do the work in question by s. 135 of the 18 & 19 Vict. c. 120, making compensation for any damage done thereby as thereinafter (s. 225) provided,—to be ascertained before two justices where the compensation claimed did not exceed 50*l.*, and, where it exceeded that sum, by arbitration according to the provisions in the Lands Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 18). Under the former acts the board had no protection, except, in the case of a trespass or other wrongful act, under s. 224 of the 18 & 19 Vict. c. 120; and s. 106 of the act of 1862 was evidently intended to remedy that inconvenience. One who sustains damage from the construction of a public work under the authority of an act of parliament, is not entitled to compensation unless the injury be one for which an action would have lain if there had been no act

(1) s. 106 of 25 & 26 Vict. c. 102, provides that, "No writ or process shall be sued out against or served upon, and no proceeding shall be instituted against, the Metropolitan Board of Works, or any vestry or district board, or their clerk, or any clerks, surveyor, contractor, officer, or person whomsoever acting under their or any of their directions, for anything done or intended to be done under the powers of such board or vestry under the said acts [18 & 19 Vict. c. 120; 19 & 20 Vict. c. 112; 21 & 22 Vict. c. 104], or this act, until the expiration of one calendar month next after notice in writing shall have been served upon such board or vestry; . . . . and every such action and proceeding shall be brought or commenced within six months next after the accrual of the cause of action or ground of claim or demand, and not afterwards."

of parliament authorizing the work to be done: *Ricket* v. *Metropolitan Railway Company*. (1) In this case all the previous authorities are reviewed by the House of Lords. But the remedy is to be by arbitration. The claim of arbitration is equivalent to a writ in an action. There can be no sound reason why the limitation provided by s. 106 should not be held to apply to a proceeding of this description; otherwise the board may be subjected to all sorts of stale claims. (2) The words of the section are, "No writ or process shall be sued out against or served upon, and no proceeding shall be instituted against the board," &c. Some effect must surely be given to the word "proceeding." It must mean something more than "action." There can be no greater hardship in imposing a limit on the time for claiming compensation in this way than there is in limiting the time for bringing an action. Changing the remedy by action into a remedy by arbitration cannot change the effect of the words of the statute.

Mellish, Q.C., was not called upon to reply.

BYLES, J. I am of opinion that the plaintiffs are entitled to our judgment. The act of parliament provides in s. 106 that no writ or process shall be sued out against or served upon, and no proceeding shall be instituted against, the Metropolitan Board of Works, &c., for anything done or intended to be done under the act, until the expiration of one month after notice, and that every such action and proceeding shall be brought or commenced within six months next after the accrual of the cause of action or ground of claim or demand. It seems to me that the word "against" clearly imports a proceeding of a hostile nature against the board. The nature of the present proceeding, however, is simply this. The claimant in effect says, "I have a cause of action against you, but it is in the nature of a claim for unliquidated damages. Let us take steps to liquidate them." I do not think that is a proceeding against the board within the contemplation of s. 106.

MONTAGUE SMITH, J. I am entirely of the same opinion. I think that s. 106 has no application to proceedings towards obtaining compensation by means of arbitration. The word

(1) Law Rep. 2 H. L. 175.

(2) See *In re Pettiward* v. *Metropolitan Board of Works*, 19 C. B. (N.S.) 489.

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"proceeding" evidently means something in the nature of a writ or process, a proceeding of a hostile character. By s. 135 of the 18 & 19 Vict. c. 120, the board are authorized to construct the sewer, making compensation for any damage done thereby as thereinafter provided. The mode of performing this condition subsequently pointed out is by an amicable attempt to arrive at the amount, and, failing that, then by calling in a third party to settle the amount between the claimant and the board. It seems to me that we should be doing violence to the language and departing from the intention of the legislature if we held the provisions of s. 106 to apply to proceedings for obtaining compensation by arbitration. The whole context shews that the section was intended to apply only to proceedings of a hostile character taken against the board, and not to a proceeding taken for the purpose of ascertaining what the board are to pay, and what they ought in the first instance to have offered to pay.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Lindsay & Mason.*
Attorneys for defendants: *N. Lindo & Sons.*

May 3.

RILEY AND ANOTHER *v.* PACKINGTON.

Principal and Agent—Authority of Agent—Liability of Chairman of Committee of proposed Company.

The defendant was associated with one W. and others in the formation of a public company. At a meeting of the projectors, of which the defendant was chairman, a resolution was passed that the prospectus then read and marked with the initials of the defendant be approved and printed for private circulation; and at a subsequent meeting, of which also the defendant was chairman, a further resolution was passed "that the prospectus as altered and marked with the chairman's initials, be approved as the prospectus of the company, and that the same be printed for circulation and advertised at the discretion of W. as early as possible."

W. employed the plaintiffs to print the prospectus, shewing them the initialed copy, and telling them that he was authorized by the defendant to get it printed. The prospectus when printed was delivered at the office of the company, and was adopted and circulated by the defendant. There was an arrangement, not communicated to the plaintiffs, between the defendant and W. that all expenses

of forming the company, down to the allotment of shares, were to be borne by W.:—

Held, that there was evidence from which the jury might infer that W. had authority to pledge the defendant's credit for the printing.

ACTION for work and labour in printing a prospectus of a projected public company.

At the trial, before Keating, J., at the sittings in London after last Trinity Term, the following facts were proved:—

Early in 1864, one Whitehead, who had been engaged in many similar transactions, endeavoured to get up a company for the building of villa residences in the neighbourhood of London, to be called The Hampton Hill Estate Company, Limited. On the 10th of August in that year a meeting was held, at which the defendant, amongst others, was present and acted as chairman. At this meeting a prospectus prepared by Whitehead was read, and the following resolution passed: "Resolved, that the prospectus now read, and marked with the initials of the chairman, be approved and printed for private circulation." The prospectus thus adopted was initialed by the defendant, and handed to Whitehead, who employed the plaintiffs to print it. When Whitehead handed the prospectus to the plaintiffs, he told them he was authorized by the defendant to have it printed, and he pointed out the defendant's initials as a proof of such authority.

A further meeting was held on the 12th of April, 1865, at which also the defendant was chairman, and the following resolution was passed: "The revised prospectus having been read, and various alterations made in it, it was unanimously resolved that the prospectus as altered, and marked with the chairman's initials, be approved as the prospectus of the company, and that the same be printed for circulation and advertised, at the discretion of Mr. Whitehead, as early as possible."

The altered prospectus was also printed by the plaintiffs by Whitehead's direction, and the copies (many of which were circulated by the defendant) were delivered at the offices of the proposed company. In this last prospectus the name of the defendant was inserted as being one of the directors; and the names of the secretary, the bankers, the brokers, &c., of the company also appeared.

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There was evidence of an engagement by Whitehead that he would bear all the expenses of establishing the company down to the time of the allotment of shares; but it was not shewn that this was communicated to the plaintiffs. The plaintiffs' books contained an account charging Whitehead with the printing of the prospectuses; and in October, 1865, an account was sent in addressed to Whitehead, and repeated applications were made to him for payment. There was, however, another account in the plaintiffs' books which was headed "The Hampton Hill Estate Company, Limited," with Whitehead's name added,—to shew, as one of the plaintiffs said, that the business had been introduced by him. It further appeared that Whitehead had upon several other occasions employed the plaintiffs to print documents of a similar description, for which they had sometimes been paid by Whitehead, and sometimes by the companies.

On the part of the defendant it was objected that the resolutions of the 10th of August, 1864, and 12th of April, 1865, did not authorize Whitehead to pledge the defendant's credit for the work in question, and that the defendant had done nothing to render himself personally liable to the plaintiffs.

The learned judge left it to the jury to say whether or not the defendant had given Whitehead authority, either express or implied, to pledge his credit to the plaintiffs for the work in question.

The jury returned a verdict for the plaintiffs; and leave was reserved to the defendant to move to enter a verdict for him if the Court should be of opinion that there was no evidence from which the jury could reasonably infer that the defendant gave Whitehead such authority.

Field, Q.C., in Michaelmas Term last, obtained a rule accordingly.

Powell, Q.C. (*Murphy* with him), shewed cause. The case is disposed of by that of *Maddick* v. *Marshall*. (1) There, the provisional directors of a projected joint-stock company resolved at a meeting that the company should be advertised in several newspapers, and directed their secretary to take the necessary steps for

(1) 16 C. B. (N.S.) 387; in error, 17 C. B. (N.S.) 829.

that purpose. The secretary accordingly applied to an advertising-agent to whom (on his calling at the company's offices to inquire under what authority the secretary was acting) he shewed the prospectus and the above resolution. And it was held that the directors, who were parties to the resolution, were responsible for the cost thereby incurred. The only difference between the two cases is that there the resolution was shewn to the advertising-agent; and here the evidence was that the defendant gave Whitehead, the secretary, authority to get the prospectus printed. Willes, J., there says (1): "I must confess I was unable to follow Mr. Lush, viz. that the directors who resolved that the advertisements should be inserted by their secretary, did not authorize him to represent that their insertion was authorized by them. It appears to me that the directors did authorize the secretary to represent, if the inquiry were made of him, what was the authority under which he acted. It was most natural that such an inquiry should be made. It is in the ordinary and necessary course of what would take place upon such a resolution being entered into. If a man is to be bound by the ordinary and necessary consequences of his acts, the defendant must be responsible for the orders given by the secretary." And Byles, J., said (2): "There are two cases in which a principal becomes liable for the acts of his agent,—one, where the agent acts within the limits of his authority,—the other, where he transgresses the actual limits, but acts within the apparent limits of his authority, where those limits have been sanctioned by the principal. When, therefore, the plaintiffs went to the offices of the projected company to inquire by whose sanction the advertisements were to be inserted, I think they had a right to assume that the agent at that place had authority from his employers or principals, the directors, to shew the books and documents which referred to the matter in hand." And, in giving judgment in the court of error, Pollock, C.B., said (3): "We are all clearly of opinion that the resolution signed by the defendant, which directed the secretary to cause the advertisements to be inserted, could not be excluded from the consideration of the jury."

(1) 16 C. B. (N.S.) at p. 392. (2) 16 C. B. (N.S.) at p. 393.
(3) 17 C. B. (N.S.) 842.

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Field, *Q.C.*, and *H. Matthews*, in support of the rule. It is clear that Whitehead had no express authority to pledge the credit of the defendant; the only question is, whether such an authority is to be implied from the circumstances. Baron Parke says, in *Thomas* v. *Edwards* (1), "The plaintiff must prove that there was an express contract, or a contract implied, between the defendant and him to pay for the things supplied. The burthen of proof is on the plaintiff." All the cases proceed upon a sort of estoppel, holding that the defendant is precluded from denying the authority of his agent where he has done some act which would convey a notion that the authority existed in fact. That doctrine has been pushed to its fullest extent in the judgment of Byles, J., in *Jolly* v. *Rees* (2), where that learned judge says: "It is a part of the law of principal and agent, that if the principal's representations or acts clothe the agent with an *appearance* of authority larger than the agent really possesses, the principal is bound by the agent's acts within the scope of that apparent authority." The majority of the Court, however, in that case dissented from the view taken by Byles, J. In *Maddick* v. *Marshall* (3) the contract was made by the secretary, the proper officer for dealing on behalf of the company, with the public. There was, therefore, an appearance of authority which both this Court and the Exchequer Chamber held to be evidence to go to the jury. Here, Whitehead held no office in the company to render him the general agent of the directors.

[BYLES, J. He was the original promoter. When the defendant approved of the prospectus, and put his initials to it, and desired Whitehead to get it printed, did he not authorize him as his agent to employ a printer for that purpose?]

By placing his initials to it, the defendant merely expressed his approval of the form of the prospectus. He did not thereby authorize Whitehead to pledge his credit for the printing of it. There was no evidence that the resolution that the prospectus should be printed was communicated to the plaintiffs. There was nothing, therefore, to warrant the conclusion to which the jury came.

(1) 2 M. & W. 215.
(2) 15 C. B. (N.S.) 628, 643; 33 L. J. (C.P.) 177, 181,
(3) 16 C. B. (N.S.) 387; in error, 17 C. B. (N.S.) 829.

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BOVILL, C.J. The plaintiffs have recovered a verdict for work done by them for the Hampton Hill Estate Company after the resolution passed at the first meeting at which the defendant presided as chairman. At that time the company was to a certain extent established: it had its offices, and its secretary, bankers, and brokers. To some extent, therefore, the business of the company was then being carried on; and the defendant was an active member of the direction. Whitehead, the person who gave the orders for the printing, was not the secretary, nor did his name appear upon the prospectus at all. On the 10th of August, 1864, the defendant being chairman, the promoters then present resolved that the prospectus then read should be printed for private circulation. For whom was it to be printed? For the directors who passed the resolution. The document, initialed by the defendant as chairman, was taken to the plaintiffs, and the initials pointed out to them, and they were told by Whitehead that he had authority to get it printed. If the resolution itself had been shewn to the plaintiffs at the same time, the case would not be distinguishable from *Maddick* v. *Marshall.* (1) But there is here that which is to my mind equivalent, viz. a true statement by the agent of the existence of a resolution authorizing the printing of the document. Then there is a further resolution of the 12th of April, 1865, as follows: "The revised prospectus having been read, and various alterations made in it, it was unanimously resolved that the prospectus as altered, and marked with the chairman's initials, be approved as the prospectus of the company, and that the same be printed for circulation and advertised, at the discretion of Mr. Whitehead, as early as possible." This resolution was acted upon by Whitehead, who was to have a discretion as to the time and mode of doing it. The prospectuses were printed and delivered by the plaintiffs at the company's offices. The defendant, who saw them there, could hardly suppose that they could have been printed without the directors being responsible for the work; and the plaintiffs, seeing the prospectuses in the hands of the defendant, might fairly presume that they were printed by his authority. In *Maddick* v.

(1) 16 C. B. (N.S.) 387; in error, 17 C. B. (N.S.) 829.

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Marshall, in the court below (1), Willes, J., lays down the principle which must guide our judgment here. There, as in the present case, there was a private arrangement as to the payment of the preliminary expenses: but the argument founded upon that fact was not allowed to prevail. It may very well be that Whitehead bound himself to indemnify the directors against those expenses. The whole matter, however, was for the jury. There was abundant evidence of authority in Whitehead to pledge the defendant's credit, and the case is not in substance distinguishable from *Maddick* v. *Marshall*. (2) In the course of the argument in the Exchequer Chamber, Pollock, C.B., says: "He (the defendant) gave the secretary the means of obtaining credit, by shewing a plausible ground which might induce any one to give him credit." (3) So, here, the conduct of the defendant was such as to enable Whitehead to get credit; and, upon the authority of that case, I think that the jury were well warranted in finding as they did, and that the rule should be discharged.

BYLES, J. I am of the same opinion, not only upon the authority of *Maddick* v. *Marshall* (2), but also upon general principles. I think there was evidence of actual authority given by the defendant to Whitehead to get the prospectus printed. The resolution of the 12th of April was that the revised prospectus as altered and marked with the chairman's initials be approved as the prospectus of the company, and that the same be printed for circulation and advertised, at the discretion of Mr. Whitehead, as early as possible. That clearly was an authority to Whitehead to shew the initialed copy to the printer. I see no obligation on Whitehead to communicate to the plaintiffs the private arrangement as to the preliminary expenses between the directors and himself. But, even if he had done so, I am still disposed to think that, as he was apparently clothed with authority to act as the general agent of the directors, those who enabled him so to act are responsible for the contract he entered into for them.

MONTAGUE SMITH, J. I am of the same opinion. It is suffi-

(1) 16 C. B. (N.S.) 387.

(2) 16 C. B. (N.S.) 387; in error, 17 C. B. (N.S.) 829.

(3) 17 C. B. (N.S.) at p. 836.

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cient to say that there was evidence from which the jury might properly find that Whitehead had the authority of the defendant for giving the order for printing the prospectus. The case does not, I think, differ substantially from that of *Maddick* v. *Marshall.* (1) The only possible distinction between them is that there the resolution for advertising was shewn to the plaintiffs. But the principle of that decision I take to be this, that the fact of the directors having passed a resolution authorizing their agent to incur an expense, affords evidence from which the jury might infer that the agent was authorized to contract. The private arrangement referred to may possibly amount to an indemnity, but it cannot qualify the general authority conferred by the resolution. If by his conduct the defendant has clothed the agent with apparent authority to contract, he is bound. The only question for us to decide is, whether my Brother Keating was warranted in leaving the question to the jury. I think he was.

KEATING, J. I am still of opinion that there was evidence for the jury, which I could not properly have withheld from them.

Rule discharged.

Attorney for plaintiffs: *A. T. Cox.*
Attorney for defendant: *J. Whitehouse.*

FRANCIS AND WIFE *v.* MINTON.

May 7.

Construction — Mortgage Deed — Conveyance in Fee by general Words, where the Grantor has only a Moiety of the Land in Fee, and is Lessee of the other Moiety.

A., being possessed of an undivided moiety of a messuage in Ratcliffe Highway, in fee, and having a lease of the other moiety with covenants to repair and insure and not to assign without licence, by deed,—reciting that he was seised in fee of the messuage in Ratcliffe Highway, and also of two leaseholds, one in Newgate Street, the other in Crawford Street,—granted to C., by way of mortgage in fee, all his estate and interest in the messuage in Ratcliffe Highway, in the most general words, and also granted to C. an underlease of the premises in Crawford Street,

(1) 16 C. B. (N.S.) 387; in error, 17 C. B. (N.S.) 829.

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and covenanted to assign to her the premises in Newgate Street, to secure payment of a debt:—

Held, that the undivided moiety in fee which A. had in the messuage in Ratcliffe Highway alone passed by this deed, and not his leasehold interest in the other moiety.

DECLARATION. On an indenture of lease of the messuage, No. 87, Ratcliffe Highway, by the plaintiffs as assignees of the reversion against the defendant as assignee of the term for breaches of covenant by the defendant.

Plea, that the defendant was not, nor ever had been such assignee.

At the trial before Byles, J., at the sittings at Westminster, after last Hilary Term, it appeared that the plaintiffs were entitled to the reversion of the premises after the determination of the lease. The defendant was administrator of his late father, G. F. Minton, who was the original lessee under the lease declared upon and owner in fee of the other moiety of the premises. The lease contained covenants to repair, to insure against fire, not to assign without licence, and also a proviso for forfeiture and re-entry, on breach of any of the covenants. The plaintiffs sought to charge the defendant personally, as assignee of the lease, he having, since his father's death, received the rents and profits, and not in his representative character as administrator of his father's estate.

The defendant put in evidence an indenture of mortgage of the 30th of November, 1847, whereby G. F. Minton, after reciting that he was entitled to an estate of freehold of inheritance in fee simple of and in the hereditaments first thereinafter assured, expectant on the death of his wife, and was also seised in fee simple of the hereditaments and premises secondly thereinafter assured, subject to certain mortgages, and was also possessed of certain leasehold premises in Newgate Street and in Crawford Street, Marylebone, for the purpose of securing a certain debt of 2142*l.* and interest to one Isabella Charlton, did "grant, &c., unto the said Isabella Charlton, her heirs and assigns," amongst other things, "secondly, all that freehold messuage or tenement, piece or parcel of ground and premises situate and being No. 87, Ratcliffe Highway, in the county of Middlesex," together with all and singular outhouses, &c., thereto belonging, "and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all

the estate, right, title, interest, property, possibility, claim and demand whatsoever as well legal as equitable of the said G. F. Minton of, in, to, or out of the said messuages, &c.;" subject to the proviso for redemption thereinafter contained. The leasehold premises in Crawford Street, Marylebone, were then "demised and leased" to Isabella Charlton for the residue of the term therein less ten days; and as to the leasehold in Newgate Street, G. F. Minton covenanted to assign, demise, and assure the same on request to Isabella Charlton. No mention was made of the leasehold interest of G. F. Minton in the premises in Ratcliffe Highway, either in the recital or in any other part of the deed.

The defendant also put in an assignment of the mortgage, dated the 21st of December, 1857, from Isabella Charlton to Thomas Wheatley, to which G. F. Minton was a party, in which the premises were described as in the mortgage deed.

It was contended on behalf of the defendant, that, inasmuch as these deeds professed to convey *all* the interest which G. F. Minton had in the premises, the leasehold moiety of the house in Ratcliffe Highway was not vested in the defendant so as to make him liable as assignee.

The learned judge nonsuited the plaintiffs, reserving leave to them to move to enter a verdict if the Court should be of opinion that the deed of the 30th of November, 1847, did not pass the leasehold moiety of the house in question to Isabella Charlton.

Keane, Q.C., in Easter Term last, obtained a rule nisi.

Prentice, Q.C., and *J. Philips*, shewed cause. By the indenture of November, 1847, G. F. Minton conveyed to Isabella Charlton all the interest he had in the premises in question. The deed recites that he was seised in fee, and it in terms conveys all his estate and interest therein whatever it might be.

[MONTAGUE SMITH, J., referred to Sheppard's Touchstone (1), where it is said that, "in cases of grants and gifts of all hereditaments, tenements, or lands, consideration is had of the estate of the grantor; for, if a man be seised of some lands in fee, and have other lands for life or years only, and all these are lying in one parish, and he grant all his lands, tenements, or hereditaments in

(1) By Preston, Vol. I. p. 91.

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this parish to another in fee simple, fee tail, or for life, and give livery of seisin in the lands whereof he is seised in fee in the name of all the rest, this doth pass no more but his lands whereof he is seised in fee; for otherwise it would be forfeiture for those other lands. But, if the livery of seisin be made in any part of the lands he hath for life or years, then that part wherein the livery is made will pass, and no more. And if the conveyance be by bargain and sale and deed enrolled, then the lands whereof he is seised in fee simple and for life shall pass, and not the land he hath for a term of years."]

The learned editor remarks upon that passage, "It must be understood that the terms of description were general, and in an instrument and mode of assurance which was proper for conveying freehold lands, and then primâ facie general words will be confined to freehold lands. By context, or circumstances, leaseholds may be comprehended. *Rose* v. *Bartlett* (1), *Day* v. *Trigg* (2), and *Knotsford* v. *Gardener* (3), are the leading authorities." And a case of *Marshall* v. *Frank* (4) is referred to in the note. There, A., possessed of lands for a term of 999 years, did for valuable consideration by lease and release grant, bargain, sell, and demise to trustees and their heirs, to the use of himself and his wife for their lives and the life of the survivor of them, remainder to the heirs of the wife, and covenanted that he was seised in fee: the wife died without issue, having made a writing in the nature of a will, and devised the premises to B. and his heirs. The Lord Chancellor (Cowper) was of opinion that though the settlement could not operate as a lease and release, yet A. being in possession, and the word "granted" being in the release, it took effect as *a grant or assignment of his whole interest at common law;* and though it would not go to the heirs of the wife, yet it should go to her administrator, it being clearly the husband's intention to divest himself of *all his interest* in the estate. Here, the conveyance is of one house, which is described as freehold.

Parisge' [BYLES, J. In *Marshall* v. *Frank* (4) the grantor had no other property than the leasehold; and therefore it was necessary to hold that his interest in the term passed, otherwise the words could have had no effect at all.]

(1) Cro. Car. 292.
(2) 1 P. Wms. 286.
(3) 2 Atk. 450.
(4) Gilb. Eq. Rep. 143; Pre. Ch. 480.

In Sheppard's Touchstone, vol. i. p. 98, by Preston, it is said: "If a man be seised of land in fee simple or for life, and [or] have an estate in it for years by statute merchant, staple, elegit, or the like, and he grant all his estate, or all his right, or all his title, or all his interest of and in the land, by this grant all his estate and as much as he is able to grant doth pass." Lord Coke, in his commentary on s. 650 of Littleton (1) says: "*State* or *estate* signifieth such inheritance, freehold, term for years, tenancie by statute merchant, staple, elegit, or the like, as any man hath in lands or tenements, &c. And by the grant of his estate, &c., as much as he can grant shall pass, as here by Littleton's case appeareth. Tenant for life, the remainder in tail, the remainder to the right heires of tenant for life, tenant for life grants totum statum suum to a man and his heires, both estates doe passe." In *Doe* d. *Davies* v. *Williams* (2) it was held that a deed of release containing the words "all lands &c., belonging, used, occupied, and enjoyed, or deemed, taken, or accepted as part thereof, &c.," will pass leasehold lands which answer that description, as well as freehold. Here the lands intended to pass are specifically described, and in terms large enough to comprehend the leasehold as well as the freehold interest. The mortgagor distinctly professes to convey all he has. The Court will not, in the absence of any evidence on the subject, assume that this lease was damnosa hæreditas at the date of the deed. The law presumes that an estate is beneficial, and that the devisee or grantee will accept it, until the contrary is shewn: *Townson* v. *Tickell.* (3)

Keane, Q.C., and *M'Mahon*, in support of the rule. It is manifest, from the whole scope of the deed of the 30th of November, 1847, that G. F. Minton intended to convey no more than the freehold interest which he possessed in the premises in question. The recitals shew that he possessed freehold property, and also two leaseholds, besides the lease of the moiety of the house in Ratcliffe Highway. He conveys the freeholds by apt and proper words descriptive of a freehold interest: and, when he comes to dispose of the leaseholds, he does so in the only way in which a mortgage of leaseholds is ever effected, viz. by underlease or by covenant to assign. That he did not intend to assign the lease of

(1) Co. Litt. 345, *a*. (2) 1 H. Bl. 25. (3) 3 B. & A. 31.

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the moiety in question is clear; for, if he had done so, the term would have thereby become forfeited: *Weatherall* v. *Gearing*. (1) The question in all these cases is one of intention. In *Earl of Derby* v. *Taylor* (2), which is the converse of this case, words equally large with those used here were held not to convey the freehold. In *Moore* v. *Magrath* (3), one by deed, in consideration of love and affection to his name, blood, and family, and for settling and securing the undivided moieties of the manors, &c., thereinafter mentioned in his name, blood, and family, granted the said undivided moieties, particularly describing them, "together with all other his lands, tenements, and hereditaments, in the Kingdom of Ireland, to A., to the several uses thereinafter declared, and for no other use whatsoever," and then declared the uses of the undivided moieties only: and it was held that the grantor did not intend to pass any lands but the undivided moieties. That the intention of the parties must govern in construing the deed is clear from *Harryman* v. *Collins*. (4) The answer to the case of *Marshall* v. *Frank* (5) has already been given by Byles, J. (6): and in *Doe* d. *Davies* v. *Williams* (7) the decision proceeded upon the ground that the intention to pass the leaseholds was sufficiently apparent. In Sheppard's Touchstone, 88, it is said: "If one seised of land in fee grant it to another, and say not for what time, this shall be taken an estate for his own life. But this is to be understood with this limitation, that no wrong be thereby done; for it is a maxim in law, quod legis constructio non facit injuriam, and also that the construction be most beneficial to the grantee. And therefore, if tenant for life, or in tail, grant the land he doth hold for life, or in tail, to another, and doth not say for what time, this shall be taken an estate for his own life (the life of the grantor), and not the life of the grantee, for then it would (in some cases) be a forfeiture; for the law, in its genuine construction, prefers a less estate by right to a large estate by wrong. Also, where no forfeiture would be incurred, the like construction would be made, because this is the construction most

(1) 12 Ves. 504.
(2) 1 East, 502.
(3) Cowp. 9.
(4) 18 Beav. 11.
(5) Gilb. Eq. Rep. 143; Pre. Ch. 480.
(6) Ante, p. 346.
(7) H. Bl. 25.

beneficial for the grantee. So, if one be seised of some lands in fee, and possessed of other lands for years, all in one parish, and he grant all his lands in that parish (without naming them) in fee simple or for life, by this grant shall pass no more but the lands he hath in fee simple."

BOVILL, C.J. The Court is called upon in this case to place a construction upon two deeds dated respectively the 30th of November, 1847, and the 21st of December, 1857, to both of which deeds G. F. Minton, the intestate, was a party. It appears that G. F. Minton was entitled to a moiety of the fee simple of the premises in dispute, and had a leasehold interest in the other moiety; and the question is, whether the leasehold interest passed by those deeds. Our decision will turn mainly upon the deed of 1847, which is recited and referred to in the deed of 1857. Both deeds contain the same general words. The deed of 1847 begins with a recital that G. F. Minton "is entitled to an estate of freehold of inheritance in fee simple of and in the hereditament firstly hereinafter assured, expectant on the death of Elizabeth, the wife of the said G. F. Minton." It further recites that he "is also seised in fee simple of the hereditaments and premises secondly hereinafter assured," subject to certain mortgages. It then recites that he is also possessed of certain leasehold premises in Newgate Street, and of certain leasehold premises in Crawford Street, Marylebone. Thus there are two properties of which G. F. Minton is stated to be seised in fee, and two others in which he is stated to have a leasehold interest. He then proceeds to "grant, bargain, sell, alien, release, ratify, and confirm" unto Elizabeth Charlton, her heirs and assigns, the freehold first mentioned; and then the deed goes on, "and secondly, all that freehold messuage or tenement, &c., situate and being No. 87, Ratcliffe Highway, in the county of Middlesex" (the property in respect of which this question arises), together with all and singular outhouses, &c., thereto belonging, "and the reversion and reversions, remainder and remainders, rents, issues, and profits thereof, and all the estate, right, title, interest, property, possibility, claim, and demand whatsoever, as well legal as equitable, of the said G. F. Minton, of, in, to, or out of the said messuages, &c., respectively;" to have and to hold the said

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messuages thereinbefore described or mentioned and expressed, and intended to be thereby granted and released, with the appurtenances, unto and to the use of the said Isabella Charlton, her heirs and assigns for ever, subject to a power of redemption. This property, therefore, is clearly dealt with as freehold. As to the two leaseholds mentioned in the recital, they are disposed of, the one by way of underlease, the other by a covenant to assign. No mention is made of the leasehold interest in the moiety of the premises in Ratcliffe Highway. But it appears from the terms of that lease that it could not be assigned without the consent of the lessor; an assignment of the interest, therefore, would have endangered a forfeiture. Looking at the clear distinction in this deed between the freehold and the leasehold interests of the grantor, and seeing that the deed was made as a security for a debt, and that the lease now in question contains a power of re-entry in case of assignment without the lessor's consent, we have to consider whether or not it was intended that the leasehold interest in the moiety of the premises in Ratcliffe Highway should pass by it. Several cases have been referred to, but in none of them did the deed contain the same language as that now before us. In *Moore* v. *Magrath* (1) the words were very large—"all other my lands, tenements, and hereditaments," and "all other my estate;" and yet they were held not to include property not specifically referred to. The question is one of intention, to be collected from the surrounding circumstances at the time, and the language of the deed; and the conclusion I come to from the facts and the frame of this deed is, that the leasehold interest in question was not intended to pass; and consequently the rule must be made absolute.

BYLES, J. I am of the same opinion. My impression was different at the trial; but I am now satisfied that I was wrong. In the recital, the interest which the grantee is to take is described to be freehold, and the grant is to her, "her heirs and assigns." That alone raises a strong presumption that the grant was intended to be a grant in fee simple. And, when we look at the lease, which would be handed over to the mortgagee, we find in it a proviso that it shall be void if assigned without the licence of the lessor.

(1) 1 Cowp. 9.

If, therefore, the lease was a beneficial lease, the assignment of it to the mortgagee would do her no good, for the lessor might re-enter; and, if it were burthensome, instead of being a security for the debt it would render her liable to the performance of the covenants. But, if there were any doubt, it is removed by the fact that the deed professes to be dealing with four several interests, two being freehold and two leasehold. It deals first with the freeholds in the way already mentioned; and then it proceeds to deal with the leaseholds, and that most guardedly and cautiously. It is first learning that, when leasehold is to be the security for a loan of money, the mortgagee must not take the whole term, but only an underlease. Accordingly, the grantor here, when he wanted to convey a leasehold interest, did so by apt words, in the one case by way of underlease, in the other by way of covenant to assign. If we were to extend the general words so as to include the leasehold moiety in question, I think we should be deciding contrary to the general scope of the deed, and contrary to the manifest intention of the parties.

KEATING, J. I am of the same opinion. The question arises in consequence of the recital in the deed of the 30th of November, 1847, misdescribing the nature and extent of the grantor's interest. If he had properly described it, and it had been necessary in order to give full effect to the words of the deed to hold that the leasehold moiety of the premises in Ratcliffe Highway passed thereby, I do not mean to intimate an opinion that it might not have passed. The nature of the grantor's interest is described as being a fee simple, without limiting it to an undivided moiety of the house. But, on looking carefully at the whole of the deed, and seeing the way in which the different kinds of property are dealt with, I come without hesitation to the conclusion that the parties did not intend the leasehold moiety to pass.

MONTAGUE SMITH, J. I am of the same opinion. I think so much of the interest of G. F. Minton in the premises in question as was freehold alone passed by the deed of the 30th of November, 1847. As has already been pointed out by the other members of the Court, the words of this deed are sufficiently large to convey all

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the interest which G. F. Minton had in the premises, both freehold and leasehold. But, looking at the whole scope of the instrument, I can come to no other conclusion than that it was not intended that the whole should pass. The scheme of the deed, carefully dividing as it does the two descriptions of property, is perfect. Where a freehold interest was intended to be conveyed, it is conveyed by apt and proper words; and where leasehold was dealt with, proper words are used to convey to the grantee an interest only, without imposing upon her a liability as assignee. If the leasehold interest were held to pass by the deed, it would be an assignment of a term; and that would render it liable to forfeiture at the election of the lessor. We cannot assume that the grantor intended to assign, and the grantee to take that which would carry with it its death-wound. It is laid down in Sheppard's Touchstone that leaseholds will pass by general words in a deed if the intention that they shall pass be apparent on the face of the instrument and there be no forfeiture; but that, where such a construction would cause a forfeiture, an intention to pass the leaseholds will not be assumed. If it had been intended that the leasehold moiety should pass, it is plain that the parties would have taken the same precaution as they did when dealing with the other two leaseholds. The covenant here being against assignment only, and not against the granting of an underlease, the reason for adopting the form of sub-demising is stronger than ordinary. Upon the whole, I agree with the rest of the Court in holding that the leasehold interest in question was not intended to pass by the deed of the 30th of November, 1847. The rule will therefore be made absolute.

Rule absolute. (1)

Attorney for plaintiffs: *C. F. Robinson.*
Attorneys for defendant: *Godwin & Pickett.*

(1) The damages were by agreement referred. Notice of appeal was given, but the case was ultimately compromised.

END OF EASTER TERM.

CASES

DETERMINED BY THE

COURT OF COMMON PLEAS

AND BY THE

COURT OF EXCHEQUER CHAMBER,

ON ERROR AND APPEAL FROM THE COURT OF COMMON PLEAS,

IN AND AFTER

TRINITY TERM, XXX VICTORIA.

LONDON AND NORTH WESTERN RAILWAY COMPANY *v.* WEST. 1867 *May* 27.

Landlord and Tenant—Estoppel.

A. let land to B. on a tenancy from year to year, which B. continued to hold for several years after A.'s title had determined, paying rent to A., and he at length gave up possession on a notice to quit from A. Subsequently to the determination of A.'s title, but before B. had given up possession, B. underlet to C. C. paid rent to B. as long as B. continued to hold, but paid no rent to any one subsequently.

In an action of ejectment brought by A. against C., after B. had given up possession:—

Held, that it might be presumed, as a matter of fact, that a new tenancy, from year to year, had been commenced by B. after A.'s title had ceased, and that C., therefore, could not dispute A.'s title.

THIS was an action of ejectment, tried before Bovill, C.J., at the sittings in Middlesex after last Easter Term. The plaintiffs, in the year 1846, obtained an act (9 & 10 Vict. c. cclxix.) for completing the West London Railway, and, by s. 10, were to complete the works within three years. Under the powers of this act they purchased the locus in quo, but not requiring it for the purposes of their railway, they let it to one Budd. By 8 & 9 Vict. c. 18,

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s. 127, it is provided that all surplus lands not sold or disposed of within ten years after the time allowed for the completion of any railway, shall become the property of the owner of the adjoining land. In 1865, the plaintiffs obtained a private act (28 & 29 Vict. c. cccxxxiii.) for various purposes, and, amongst other things, it was provided by s. 23 that they should be entitled to retain any lands acquired by them in certain parishes, including that in which the locus in quo was situated.

The defendant was let into possession of the property by Budd in 1863, and paid rent to him. In 1864, the plaintiffs gave Budd notice to quit, which he did, and there was no evidence that the defendant had paid rent to any one subsequently to that date.

Upon this evidence, a verdict was, by consent, entered for the plaintiffs, with leave to the defendant to move to enter a verdict for the defendant.

Staveley Hill moved for a rule pursuant to the leave reserved.

The ten years mentioned in 8 & 9 Vict. c. 18, s. 127, ended in 1859, and since then the locus in quo has really belonged to the adjoining owner, and the plaintiffs have, therefore, failed to make out their title. The private act, 28 & 29 Vict. c. cccxxxiii. s. 23, could not entitle them to "retain" lands which, at the time, were not theirs.

[BOVILL, C.J. Here the defendant has come into possession under a tenant of the plaintiffs, and how can he dispute the plaintiffs' title?]

At the time the defendant was let into possession, Budd was not really a tenant of the plaintiffs, for their title had ceased, and they were not even mentioned to the defendant, and he has never paid rent to or otherwise acknowledged them.

BOVILL, C.J. I think there should be no rule. It is not necessary to decide the question which arises as to the construction of the acts of parliament, because the defendant, under the circumstances, is estopped from disputing the plaintiffs' title. The defendant came in under Budd subsequently to the year 1859, when the plaintiffs' title is alleged to have ceased; it is clear he could not have disputed Budd's title if that had been in

question, and he cannot, I think, dispute the plaintiffs' title, from which Budd's title is derived. On this ground I think the rule should be refused.

WILLES, J. I am of the same opinion. It seems to me that the question is whether, if Budd had been the defendant instead of West, he could have resisted this ejectment, for West came in under Budd; and since no change has taken place in the right of the different parties since his tenancy commenced, he cannot dispute that the rights of Budd have duly vested in him. Would, then, Budd be able to dispute the plaintiffs' title? If his tenancy had commenced after 1859, when the land is alleged to have vested in the adjoining owner, there is no doubt that he would have been estopped from doing so, since a tenant cannot dispute his landlord's title, except by shewing that such title has terminated since the commencement of the tenancy. In this case, the answer is to be found in a conclusion of fact; namely, that as the question is raised by a mere stranger who does not even allege that he has any title himself, we ought to conclude, if necessary, that Budd intended to remain tenant to the plaintiffs after 1859, and that there was therefore a new tenancy in law from year to year created subsequently to the year 1859. He therefore could not have disputed the plaintiffs' title, and neither can the defendant.

KEATING, J. I am of the same opinion. It is undisputed that the defendant came into possession as tenant to Budd; and the estoppel, which prevents a tenant denying his landlord's title, extends to under-tenants; the estoppel, therefore, which bound Budd must also bind the defendant.

MONTAGUE SMITH, J. I am of the same opinion. I think that, whatever is the true interpretation of the statutes, the verdict for the plaintiffs must stand. The defendant cannot have a better title than Budd, under whom he came in; and though a tenant may shew that his landlord's title has expired, yet, in this case, Budd consented to go on after the time when the plaintiffs' title is alleged to have ceased, and it may be presumed, therefore, that he intended to continue tenant to the plaintiffs.

Rule refused.

Attorney for defendant: *H. E. Rice.*

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June 10.

THE NATIONAL SAVINGS BANK ASSOCIATION, LIMITED *v.* TRANAH.

Promissory Note—Suspension of Right of Action—Payment.

Declaration upon the common counts. Plea, that the defendant, with the plaintiffs' consent, had delivered a promissory note on account of the debt to C., who still held it. Replication, on equitable grounds, that C. at the time of the delivery had been and still was a trustee of the plaintiffs, who were alone beneficially interested in the note, of which the defendant had notice, and that the note was overdue and unpaid:—

Held, on demurrer, a good replication.

Declaration for money lent, money paid, and for interest.

Plea, as to 150*l.*, that, after the accruing of the claim, the defendant, with the authority and at the request of the plaintiffs, delivered to J. W. Williamson and J. F. Wieland his promissory note, whereby he promised to pay to them or their order 150*l.*, three months after date, and the note was made and delivered and accepted and renewed by the said persons, with the authority of the plaintiffs, on account of the claim therein pleaded to, and the said persons thenceforth had been and still were holders of the bill.

Replication, on equitable grounds, that J. W. Williamson and J. F. Wieland, at the time of the delivery of the note to them, had been and still were trustees for the plaintiffs, and the note was delivered to them for the benefit of the plaintiffs, and not otherwise; and the plaintiffs always had been and were the sole persons interested in and entitled to the benefit of the note; of all which the defendant had due notice, and that before and at the time of the commencement of the suit the note had been and still was due and unpaid.

Demurrer and joinder.

Schalch, in support of the demurrer. The case of *Crowe* v. *Clay* (1) shews that, generally speaking, no action can be brought to recover a debt for which a promissory note has been given while that note is outstanding, even if it is overdue; and the only question in this case, therefore, is, whether the fact that the holders are trustees for the plaintiffs makes any difference. If the trustees

(1) 9 Ex. 604; 23 L. J. (Ex.) 150, 18 June 654

endorsed the note over, it might give rise to litigation, though the recovery by the plaintiffs in this action would probably afford an answer to an action on it. The plaintiffs, however, have no right to put the defendant to such risk and trouble. The cases respecting lost negotiable instruments—*Hansard* v. *Robinson* (1), *Ramuz* v. *Crowe* (2)—were decided on that ground. The replication is not good as an equitable replication, any more than as a legal one; for a court of equity would not grant an unconditional injunction, but would require the note to be given up, or an indemnity given by the plaintiffs: Story, Eq. Jur. ss. 86, 698—700: *Jervis* v. *White*. (3)

Holl, in support of the replication. The replication shews that the holders of the note hold it as agents of the plaintiffs. It would not be necessary for the plaintiffs to produce or give up the note in order to support such an action as this, if the note were in their hands; the defendant would, therefore, in any case be liable to an action on it; while payment in the present action would clearly be a good answer to an action on the note by the trustees.

[WILLES, J. If A. owes B. money, and at B.'s request gives a note to C. for the amount, is there in point of law any consideration for such a note?]

If not, it only shews that the note in the present case is void, and the plaintiffs entitled to recover.

Schalch, in reply. The giving of the note operates as a conditional payment, and the plaintiffs must bring themselves within one of the causes which defeat it, according to *Ramuz* v. *Crowe*. (2) Though a formal tender is not necessary, the defendant is entitled to have the note given up to him if he demands it, and the plaintiffs in this case cannot give it up to him.

[BOVILL, C.J. Would not the defendant be able to recover back the note from the trustees after paying the claim in this action?]

Perhaps so, but he is entitled to have the note without bringing an action to recover it.

BOVILL, C.J. I am of opinion that our judgment should be for the plaintiffs. The debt sued for is admitted on these pleadings

(1) 7 B. & C. 90. (2) 1 Ex. 167; 16 L. J. (Ex.) 280. (3) 7 Ves. 412.

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to exist: the plea sets up, not a discharge, but a suspension of the remedy by the giving of a promissory note; the replication shews that that note is unpaid, and that, therefore, the remedy has revived. The defendant, however, relies on the fact that the note is outstanding in the hands of Williamson and Wieland. It was, however, placed in their hands by consent of both parties, and not in satisfaction but only on account of the claim made in this action, and it is still held by them as trustees for the plaintiffs. It seems to me, therefore, that the replication is good both in law and equity, and differs very little from one averring that the note is overdue and unpaid and in the hands of the plaintiffs themselves.

WILLES, J. I am of the same opinion. It is convenient to follow the decision of *Price* v. *Price* (1), and to hold that the plea must state that the note is outstanding in the hands of third parties, instead of leaving the contrary to be implied. Here, the plea fulfils that condition, but the replication adds that it was put into the hands of these third parties as trustees having no interest in it themselves, and this with the defendant's knowledge. Add to this what is stated in the plea, that the note was held, not in accord and satisfaction of the claim, but only on account of it, and the whole amounts really to an averment that it was agreed between the parties that the note should be held by Williamson and Wieland in the same way as if it had been held by the plaintiffs, and it is admitted that if it had been held by the plaintiffs it would have afforded no answer to the claim in this action.

MONTAGUE SMITH, J., concurred.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Lewis, Munns, Nunn, & Longden.*
Attorneys for defendant: *G. S. & H. Brandon.*

(1) 16 M. & W. 232.

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June 13.

Debtor and Creditor—Bankruptcy Act (24 & 25 *Vict. c.* 134), *s.* 192—*Composition Deed—Equality—Construction—"On behalf of themselves and all and every other the creditors."*

A deed of composition between the debtor of the first part, and the several creditors whose names were subscribed, "on behalf of themselves and all and every other the creditors," of the second part, professed to be a deed under s. 192 of the Bankruptcy Act, 1861, and to secure the payment of a composition to all the creditors, and contained a covenant "with each and every of the said creditors" to pay the composition, and a release by the parties of the second part:—

Held, that the deed was not void on the ground of inequality, as it might be construed as making all the creditors parties, and therefore capable of enforcing the covenant. (1)

Semble, that where creditors not executing or assenting to the deed are excluded the deed is invalid, but the absence of express words to include all creditors does not necessarily render the deed bad.

DECLARATION for goods sold and delivered, and on accounts stated.

Plea, for defence upon equitable grounds, that, after the accruing of the plaintiff's claim, a deed of composition was entered into by and between the defendant, of the first part, and "the several persons whose names are subscribed and seals affixed to the schedule hereunder written, being respectively, either individually or in co-partnership with others, creditors of the said J. Baxter, the defendant, on behalf of themselves and all and every other the creditors of the said J. Baxter, of the second part:" whereby, after reciting that the defendant was unable to pay his debts in full, that he had proposed to pay all his creditors, whether executing the deed or not, 10*s.* in the pound on their respective debts, by certain instalments, in full satisfaction and discharge of his liability to his creditors, and that the requisite majority of creditors had agreed to accept the said proposition, the defendant covenanted "with each and every of his said creditors that he the said debtor, his executors, &c., will well and truly pay or cause to be paid to the said creditors" the said composition. The deed contained a release by "the parties hereto of the second part, for themselves

(1) Accord *Isaacs* v. *Green*, Law Rep. 2 Ex. 352.

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and their several and respective partners," and a proviso that, in case default should be made in paying the composition the deed should be void; and also a provision that the deed should not prejudice securities or any remedies against any person other than the debtor. And it was thereby lastly declared that the deed was intended to operate as a deed of composition within the provisions of the Bankruptcy Act, 1861. The plea then averred that the required majority of the creditors assented to the deed; that the deed was executed by the defendant, attested by an attorney, and duly registered, &c., as required by the 192nd section of the Bankruptcy Act, 1861; that, at the time of the execution of the deed, the plaintiff was a creditor of the defendant in respect of the claim pleaded to. General averment of performance of all conditions, &c., and that the plaintiff was bound by the deed as if he had duly executed it. (1)

Second replication, that several persons executed the said deed as parties thereto of the second part, and their names were subscribed and seals affixed to the schedule thereunder written, and that they were admitted by the defendant creditors of the defendant; but the plaintiff did not execute, nor did he assent to or approve of the said deed.

Demurrer and joinder.

O'Malley, Q.C. (*Cowie* with him), in support of the demurrer. The objection intended to be urged against this deed is, that non-executing creditors are not made parties thereto of the second part. That clearly is not tenable.

Piffard, contrà, was called upon by the Court. The real objection to this deed is, that the creditors are not put upon an equality, inasmuch as those only of them who are parties to it could sue upon it. That inequality avoids a deed of this description is shewn by numerous authorities: see *Chesterfield and Midland Silkstone Colliery Company* v. *Hawkins* (2); *Gurrin* v. *Kopera* (3); *Scott* v. *Berry* (4); *Gresty* v. *Gibson* (5); *Reeves* v. *Watts*. (6)

(1) The plea contained no averment that any of the creditors *executed* the deed.

(2) 3 H. & C. 677; 34 L. J. (Ex.) 121.

(3) 3 H. & C. 694; 34 L. J. (Ex.) 128.

(4) 3 H. & C. 966; 34 L. J. (Ex.) 193.

(5) Law Rep. 1 Ex. 112.

(6) Law Rep. 1 Q. B. 412.

In each of the three cases last cited, the deed was held to be good, either because the parties to the deed of the second part were *all* the creditors, or because there was in truth no inequality. In *Chesterfield and Midland Silkstone Colliery Company* v. *Hawkins* (1) it was distinctly laid down that, where a deed is made inter partes, no one who is not expressed to be a party can sue on a covenant contained in it; and that this is not a mere rule of construction, but a rule of positive law. That proceeded very much upon what is laid down by Lord Westbury in *Ex parte Cockburn* (2), where he says: "It is clear that the creditors who are not named and described in the schedule and have not executed the deed could not sue upon the covenant of the debtor. The covenant is with the parties to the deed of the second and third parts; and, as the deed is between parties, no person who is not a party could sue upon the covenant." A similar decision was come to, and upon the same ground, in *Gurrin* v. *Kopera*. (3)

[BOVILL, C. J. This deed is expressed to be made between the defendant and all his creditors; and it is intended to be a deed under the act.]

It is expressed to be made between the debtor of the first part, and the several persons whose names are subscribed and seals affixed, of the second part. It is true it goes on "on behalf of themselves and all and every other the creditors." But that does not make the other creditors parties. In *M'Ardle* v. *Irish Iodine Manufacturing Company* (4), it is said that a deed executed by A. "on behalf of B.," must, in order to bind B., be executed by A. *in the name of B.*, or by A. in his own name, with such words as shew that he is acting solely as the agent of B. in such execution. In *Gresty* v. *Gibson* (5) and *Reeves* v. *Watts* (6) the deeds were expressly made between the debtor and *all* his creditors. Upon the authority, therefore, of the dictum of Lord Westbury in *Ex parte Cockburn* (2), and of the decisions of the Court of Exchequer in *Gurrin* v. *Kopera* (3) and *Scott* v. *Berry* (7), if there be any difference in the mode in which the

(1) 3 H. & C. 677; 34 L. J. (Ex.) 121.
(2) 33 L. J. (Bk.) 17.
(3) 3 H. & C. 694; 34 L. J. (Ex.) 128.
(4) 15 Ir. C. L. Rep. 146.
(5) Law Rep. 1 Ex. 112.
(6) Law Rep. 1 Q. B. 412.
(7) 3 H. & C. 966; 34 L. J. (Ex.) 193.

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two sets of creditors can enforce their remedies under the deed, it is unequal and void.

O'Malley, Q.C. The 192nd section of the Bankruptcy Act, 1861, enacts that a deed which complies with the conditions therein enumerated shall be valid and binding on all the creditors as if all of them were parties to it and it could not be intended that obligations should be imposed without corresponding rights being conferred at the same time. This deed was intended to be a deed in compliance with that section, and is expressly stated to be for the benefit of all the defendant's creditors. *Tetley* v. *Wanless* (1) shews how far the Courts will go in upholding a deed of this kind. No violence is done to the language of this deed by holding it sufficient to place all the creditors upon an equal footing. This objection was urged without effect in *Brooks* v. *Jennings*. (2) The decision in that case would have been wrong unless the Court had intended to hold either that it was not necessary to the validity of the deed that all the creditors should be parties to it, or that upon the construction of the deed before them all were parties; and in *Clapham* v. *Atkinson* (3) the Court of Exchequer Chamber held the deed good because all the creditors had the option of coming in and signing it, and none were excluded from the benefit of it. In *Gurrin* v. *Kopera* (4) the point was not considered, and it is impossible to distinguish this case from *Brooks* v. *Jennings*. (2) [He was then stopped.]

BOVILL, C.J. If effect is to be given to it according to the decision in *Clapham* v. *Atkinson* (3), the deed in question is a good deed, on the ground that all the creditors have the option of coming in and executing it. It also appears to me that, inasmuch as the deed professes to be a deed under the Bankruptcy Act, 1861, and it being manifest that the intention of it was that the composition should be paid to all the creditors, we ought to give a reasonable effect to it in order to carry out that intention. There

(1) Law Rep. 2 Ex. 21; affirmed, Law Rep. 2 Ex. 275.

(2) Law Rep. 1 C. P. 476; H. & R. 414.

(3) 4 B. & S. 722; 33 L. J. (Q.B.) 81; in error, 4 B. & S. 730; 34 L. J. (Q.B.) 49.

(4) 3 H. & C. 694; 34 L. J. (Ex.) 128.

is a recital that the debtor has proposed to pay to all his creditors, whether executing the deed or not, a composition of 10*s.* in the pound on their respective debts; and the covenant to pay the composition professes to be made "with each and every of his said creditors," which I construe to mean all his creditors. If, looking at all the provisions of the deed, we find a manifest intention that composition shall be paid to all the creditors, and the covenant is with all, it requires very little more to shew that the deed was intended to be made with all; and, though there may be some ambiguity in the language, we ought if possible to give effect to the deed so as to carry out that intention. Now, the ambiguity is in the words describing the parties of the second part,—"and the several persons whose names are subscribed and seals affixed to the schedule hereunder written, being respectively, either individually or in co-partnership with others, creditors of the said J. Baxter;" and then follow these words, "on behalf of themselves and all and every other the creditors of the said J. Baxter." I see no substantial inaccuracy in that. If a comma be inserted after "themselves," all parts of the deed will be found consistent and valid. We have been strongly pressed by Mr. Piffard with the case of *Gurrin* v. *Kopera*. (1) But, on looking carefully at that case, I do not find that it at all militates against what I am laying down. It was assumed there that the other creditors were not parties to the deed; and the decision proceeds upon that assumption. In the report of *Brooks* v. *Jennings* in Harrison & Rutherford, the point now relied on appears to have been taken; for Mr. Philbrick says: "The only security for the payment of the composition is a bare covenant; and creditors not parties to it are without remedy." But the argument does not seem to have made any impression, and the answer given by my Brother Montague Smith, that there was nothing to prevent each creditor from suing on the deed, seems to have been acquiesced in. In *Gurrin* v. *Kopera* (1), not only was there no decision upon this point, but it was not even raised. Such being the state of the authorities, and looking at the general scope of this deed, I construe the words in the earlier part of it as including *all* the creditors, and hold it to be a valid deed.

(1) 3 H. & C. 694; 34 L. J. (Ex.) 128.

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MONTAGUE SMITH, J. I am of the same opinion. The deed in the body of it professes to secure a composition of 10*s.* in the pound to all the creditors, whether parties to the deed or not. The objection urged against the deed is that non-executing creditors cannot sue upon it; and some of the cases referred to seem to afford some foundation for the argument. If the matter were res integra, I should have had no hesitation in coming to the conclusion that non-executing creditors could sue. The 192nd section of the statute contemplates a deed which may not be executed by all the creditors; and it enacts that, provided certain conditions are observed, it shall be as "valid, effectual, and binding on all the creditors as if they were parties to, and had duly executed the same." By necessary implication, therefore, it contemplates that all may sue upon the deed, as if parties actually signing it. Although I entertain that opinion, I should of course feel myself bound by a decision to the contrary, if express; but it seems to me that there is nothing in any of the cases to which we have been referred to prevent the Court from coming to the conclusion they think the right one. The authority first relied on by Mr. Piffard was the dictum of Lord Westbury in *Ex parte Cockburn* (1), that, "as the deed is between parties, no person who is not a party could sue upon the covenant." But that was not necessary to the decision of the case, and must be considered as overruled by the cases of *Gresty* v. *Gibson* (2) and *Reeves* v. *Watts*. (3) So far, therefore, as the great authority of Lord Westbury goes, that observation does not appear to have been acquiesced in. Another case much relied on for the plaintiff was *Gurrin* v. *Kopera*. (4) That case seems to have been determined without much discussion, and upon the notion that it was governed by *Chesterfield and Midland Silkstone Colliery Company* v. *Hawkins*. (5) In that case it seems to have been held that, where a deed is made inter partes, no one who is not expressed to be a party can sue on a covenant contained in it. That appears to me to be contrary to the principle upon which the later cases were decided, and is at all events balanced by *Brooks* v. *Jennings* (6),

(1) 33 L. J. (Bk.) 17. (5) 3 H. & C. 677; 34 L. J. (Ex.) 121.
(2) Law Rep. 1 Ex. 112. (6) Law Rep. 1 C. P. 476; H. & R. 414.
(3) Law Rep. 1 Q. B. 412.
(4) 3 H. & C. 694; 34 L. J. (Ex.) 128.

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where the point was referred to, and must be taken not to have been assented to by the Court. It seems to me that the authorities which sanction our present decision are of more weight than those upon which Mr. Piffard relies. It may be that the deed is invalid where creditors not executing or assenting to it are excluded; but I do not think that the absence of express words to include all the creditors renders the deed bad.

Judgment for the defendant.

Attorney for plaintiff: *G. M. Wetherfield.*
Attorney for defendant: *H. G. Carew.*

June 27.

LADY HOLLAND, APPELLANT; THE KENSINGTON VESTRY, RESPONDENTS.

Metropolitan Management Act, 1855 (18 & 19 *Vict. c.* 120), *s.* 250—*Owner*—*Building Agreement.*

A., being owner in fee of certain land, entered into a building agreement with B., by which B. agreed to build certain houses on part of the land, and lay out the remainder as a garden for the exclusive use of the tenants of the houses, and A. agreed to grant B. a lease of each house as it was built, and to grant him a lease of the garden with the last house; and it was expressly agreed that B. should have no interest in any house or land until a lease of it was granted. B. built some of the houses, but not all, and laid out the garden; and A. subsequently sold the reversions of the houses which were built to C. The parish in which the land was situated having paved a road running past the garden, claimed repayment of the expense from A.:—

Held, that A. was the owner of the land within the meaning of the Metropolitan Management Acts, 1855 and 1862 (18 & 19 Vict. c. 120, and 25 & 26 Vict. c. 102), and therefore liable.

CASE stated by the police magistrate at Hammersmith under 20 & 21 Vict. c. 43.

The late Lord Holland being the owner in fee of certain land at Kensington, entered into a building agreement with one Hall, by which it was provided that Hall should build on the land sixty-three houses, and should lay out the remainder as an ornamental garden for the exclusive use of the tenants of the houses, and that Lord Holland should grant to Hall leases of the houses as they were finished, and should grant him with the last house a lease of

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the garden; and it was expressly provided that the agreement should not operate as an actual or present demise of the premises, or give Hall any legal or equitable estate or interest therein, till the leases should be actually executed, but that he should only have a right to enter on the plots of land thereby agreed to be demised for the purpose of performing the agreement. Hall built, in accordance with the agreement, twenty of the houses, and obtained leases of them, and laid out the garden. Lord Holland, having died, devised the property in fee to the appellant, who subsequently sold the reversion of the houses built by Hall, together with their ground-rents, to one Robinson. A road ran along one end of the garden, and the Vestry of Kensington, having paved it, summoned the appellant as the owner of the garden, within the meaning of 18 & 19 Vict. c. 120, and 25 & 26 Vict. c. 102, before the magistrate, to obtain the repayment of the amount expended in paving. The magistrate held that the appellant was owner within the meaning of the acts, and liable, as such, to repay the money, and, at the request of the appellant, stated this case.

Hayes, Serjt. (*Macnamara* with him), for the appellant. The question really turns on the meaning of the word "owner" in the Metropolitan Management Act, for the owner is undoubtedly liable to pay the sum claimed, under the provisions of 18 & 19 Vict. c. 120, s. 105, as extended by 25 & 26 Vict. c. 102, s. 77. The definition is given in the interpretation clause, which is s. 250 of the earlier act. Lady Holland may be the legal owner, but she has no real interest in the land, and receives at most only a ground-rent for it, and not a rack-rent. She would be restrained in equity from any personal use of the ground, and could not give any one else a right to walk there; she has not, therefore, really any interest in it, except the right to the ground-rent.

[WILLES J. Who is the owner then?]

The appellant is not bound to shew, but it is submitted that Hall would be; he has a right to the possession of the land, though a lease of it has not yet been granted. There have been some cases decided on the meaning of "owner" in the Metropolitan Building Acts, but none upon its construction in this act.

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Mellish, Q.C. (*Raymond* with him), was not called upon.

WILLES, J. The question for the Court is, whether Lady Holland is owner of this garden within the meaning of 18 & 19 Vict. c. 120, s. 250; if she is, she is liable to pay the sum claimed under the 77th section of the subsequent act (25 & 26 Vict. c. 102). It is not necessary to discuss the cases decided upon the Metropolitan Building Act, because, as the legislature has used different words in that act as a definition of "owner," we must presume it intended to signify something different. It becomes, therefore, simply a question of the construction of the section now before us. In this case, there is a rent paid to the appellant, but it is not necessary to decide that that is a rack-rent; if it be, there is an end of the question; but even if not, the appellant is in this position: before the building agreement Lord Holland was certainly the owner of the land, and unquestionably liable to the charges now in question, and I think it may be safely said that no agreement between private individuals can have discharged him of that liability, unless it has fixed it on some other person. The only person whom it can be suggested that it has rendered liable is Hall; but he has no legal interest. The position of a builder under a building agreement was settled in the case of *Camden* v. *Batterbury* (1), and it is in accordance with the very terms of the agreement in the present case. If the houses had been all built, and Hall had obtained a lease of the garden, he would have been trustee for the inhabitants of the houses, and would have been liable under the section. But at present the appellant is the legal owner, subject only to certain easements possessed by the inhabitants of the houses that have been built, and to the condition that if and when certain acts are done she will be bound to grant the legal estate to Hall. It may be that she only holds as trustee for the inhabitants of the houses, but it is not only the beneficial owner, but the owner who holds as trustee for others, that is liable to make the payment under the acts.

KEATING, J. I also think that the magistrate was right. My

(1) 5 C. B. (N.S.) 808; 28 L. J. (C.P.) 187. In error, 7 C. B. (N.S.) 864; 28 L. J. (C.P.) 335.

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Brother Hayes was right when he said that he was not bound to shew who was the "owner;" but still one way of trying whether the appellant is owner is to see whether any one else is. It is clear, as my Brother Willes says, that Lord Holland was originally the owner, and the only person who could be suggested as having become the owner, if the appellant is not, is Hall, and it is clear that he is not; for the last clause of the building agreement expressly provides that he shall take no interest in the land, legal or equitable, under it till all the houses are built. It is equally clear, therefore, that the appellant is the owner.

Judgment affirmed.

Attorneys for appellant: *Stephens & Matthews.*
Attorneys for respondents: *Pontifex, West, & Pontifex.*

June 29.

BETTELEY *v.* STAINSBY.

Bankruptcy—Cost-book System—Covenant to indemnify—Bankrupt Law Consolidation Act, 1849 (12 *&* 13 *Vict. c.* 106), *ss.* 173, 178.

A., being indebted to B., transferred to him as a security for the debt certain shares in a mine conducted on the cost-book system, and covenanted with B. to indemnify him from all manner of charges, liabilities, and costs that might accrue or attach to or in respect of the shares. A. became bankrupt in 1855, and B., having been compelled as a shareholder to pay certain debts of the company which had accrued before A.'s bankruptcy, sued A. on his covenant to indemnify:—

Held, that A. was not protected either by s. 173 or by s. 178 of the Bankruptcy Act, 1849. (1)

THIS was a special case stated for the opinion of the Court.

The material facts, as set forth in the case, were as follows:—The defendant, being indebted to the plaintiff to the amount of 6000*l.*,

(1) 12 & 13 Vict. c. 106, s. 173: "That any person who, at the time of the issuing of the fiat, or of filing a petition for adjudication of bankruptcy, shall be surety or liable for any debt of the bankrupt, or bail for the bankrupt, either to the sheriff or to the action, if he shall have paid the debt, or any part thereof in discharge of the whole debt (although he may have paid the same after the issuing of the fiat or the filing of the petition for adjudication of bankruptcy), if the creditor shall have proved his debt under the bankruptcy, shall be entitled to stand in the place of such creditor as to the dividends and all other rights

transferred into his name certain shares in the Wheal Gaskin Company (being the proprietors of a mine conducted on the cost-book system). By a deed subsequently entered into between them, dated A.D. 1854, he covenanted, inter alia, that he would at all times, and from time to time, keep the plaintiff harmless and indemnified from and against all calls that might at any time or times be made upon the said shares in the Wheal Gaskin Company, and from and against all and all manner of charges, liabilities, and costs then existing or attaching to or upon the said shares, or that might at any time thereafter accrue, exist, or attach to or upon the said shares, or in any way in respect thereof, and should from time to time discharge and defray the same out of his own proper moneys. In 1855 the defendant became bankrupt. After the defendant's bankruptcy, various actions were commenced by creditors of the Wheal Gaskin Company, in respect

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under the bankruptcy which such creditor possessed or would be entitled to in respect of such proof; or if the creditor shall not have proved, such surety or person liable, or bail, shall be entitled to prove his demand in respect of such payment as a debt under the bankruptcy, not disturbing the former dividends, and may receive dividends with the other creditors, although he may have become surety, liable, or bail as aforesaid after an act of bankruptcy committed by the bankrupt: Provided that such person had not, when he became such surety or bail, or so liable as aforesaid, notice of any act of bankruptcy by such bankrupt committed."

s. 178: "That if any trader who shall become bankrupt after the commencement of this act shall have contracted, before the filing of a petition for adjudication of bankruptcy, a liability to pay money upon a contingency which shall not have happened, and the demand in respect thereof shall not have been ascertained before the filing of such petition, in every such case, if such liability be not provable under any other provision of this act, the person with whom such liability has been contracted shall be admitted to claim for such sum as the Court shall think fit; and after the contingency shall have happened, and the demand in respect of such liability shall have been ascertained, he shall be admitted to prove such demand, and receive dividends with the other creditors, and, so far as practicable, as if the contingency had happened and the demand had been ascertained before the filing of such petition, but not disturbing former dividends: Provided such person had not, at the time such liability was contracted, notice of any act of bankruptcy by such bankrupt committed; provided also, that where any such claim shall not have, either in whole or in part, been converted into a proof within six months after the filing of such petition, it may, upon the application of the assignees at any time after the expiration of such time, and if the Court shall think fit, be expunged either in whole or in part from the proceedings."

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of debts of the company which had accrued previously to the bankruptcy, against the plaintiff, as a shareholder in respect of the shares which had been transferred into and registered in his name as above-mentioned; and the plaintiff was compelled to pay 429*l.* 11*s.* as debt and costs. The present action was brought to recover this sum from the defendant as damages for the breach of his covenant to indemnify above set forth. The defendant pleaded his bankruptcy. The case was tried before Bovill, C.J., at the sittings in London after Trinity Term, 1866, and a verdict entered by consent for the plaintiff, subject to this special case, the Court having power, by consent, to draw inferences of fact.

Hannen (*Lord* with him), for the plaintiff. The cause of action arose previous to 1861, so it is upon the Bankruptcy Act, 1849, that the defendant must rely. The 178th section of that act (1) renders certain contingent liabilities capable of proof, but only those in which a sum of money is due from the bankrupt, which is either ascertained or ascertainable on a single contingency. This was finally decided by the House of Lords in *Mitcalfe* v. *Hanson* (2), where the whole matter was fully discussed. In *Maples* v. *Pepper* (3), which was an action on a covenant collateral to a lease, it was held that a liability to pay damages for the breach of a covenant was not a claim within the act; and in *General Discount Company, Limited* v. *Stokes* (4) it was held that a call made by a company on a shareholder was not barred by his previous bankruptcy.

[WILLES, J. In *Young* v. *Winter* (5) this Court held that the Bankruptcy Act was an answer to a claim under a covenant to repay any moneys paid by the covenantee to keep up a policy of insurance; but the Court of Queen's Bench held otherwise in *Warburg* v. *Tucker* (6), and that opinion finally has prevailed. It was also decided in *Maples* v. *Pepper* (3) that a contingency that the bankrupt should break his contract is not such a contingency as is meant by the act.]

(1) Ante, p. 569.
(2) Law Rep. 1 H. L. 242.
(3) 18 C. B. 177; 25 L. J. (C.P.) 243.
(4) 17 C. B. (N.S.) 765; 34 L. J. (C.P.) 25.
(5) 16 C. B. 401; 24 L. J. (C. P.) 214.
(6) 5 E. & B. 384; 24 L. J. (Q.B.) 317.

Mellish, Q.C. (*Watkin Williams* with him), for the defendant. The two sections of the act on which the defendant relies are the 173rd and 178th. The shares were only transferred to the plaintiff as a security; as between the plaintiff and defendant they really continued the property of the defendant. The creditors, therefore, might have sued the defendant as an actual partner in the company, as well as the plaintiff as an ostensible partner, and the creditors might have proved for the debt against the defendant. The 173rd section is not confined to sureties, in the strictest sense of the word, but whenever a person is liable to pay a debt if the bankrupt does not pay it, but for which the bankrupt is also liable, he is a surety within the meaning of that clause. Here, therefore, the plaintiff was really a surety in respect of these claims, and they are, therefore, barred by the bankruptcy. But the plaintiff's claim also comes within the 178th section, for it is dependent upon the single contingency of the plaintiff paying these sums. They were sums actually due at the time of the bankruptcy; their amount, therefore, was ascertained, and the defendant's liability to the plaintiff depended only upon the plaintiff's paying them, which he did in fact do, within six months of the bankruptcy. As soon as he did so it became due from the defendant, as money paid to his use. If such be the real relation between the parties, the existence of this covenant, which enables the plaintiff to bring the action in the form of an action for damages, cannot make any difference, or deprive the defendant of his protection. The case of *Warburg* v. *Tucker* (1) is quite different; there there was an additional contingency every time one of the premiums became due, and the amount of the contingent debt was wholly unascertainable. In *Ex parte Barwis* (2) the applicability of s. 178 is said to depend on whether there is any measure, or a limit of the liability, and here there is such in the amount of the debts that were due.

[WILLES, J. That case followed *Ex parte Todd* (3), in which unliquidated damages were to be awarded by an arbitrator for a tort, and they had been held not to be proveable under a bankruptcy, and it was as distinguishing it from that case that it was

(1) 5 E. & B. 384; E. B. & E. 914; 24 L. J. (Q.B.) 317; 28 L. J. (Q.B.) 56.

(2) 6 D. M. & G. 762

(3) 6 D. M. & G. 744,

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said in *Ex parte Barwis* (1) that the amount of the claim was ascertainable.]

Hannen, in reply. At the time of the bankruptcy it was uncertain not only whether the plaintiff would pay, but whether he would be called on to do so, and to what extent. There were several contingencies therefore; first, the defendant not paying according to his agreement; secondly, the creditors suing the plaintiff; and thirdly, his paying. The 178th section, therefore, is inapplicable. The 173rd section does not apply, because the defendant was never really liable; after the shares were transferred the creditors could only proceed against the actual shareholders. Nothing that has happened since the bankruptcy can affect the case, and the fact that the plaintiff did actually pay these sums within six months after the bankruptcy, therefore, is immaterial. The plaintiff was equally liable to pay all the debts of the company, and might, therefore, have made a claim against the bankrupt's estate in respect of the whole of them, if he could in respect of those now in question; he would have thereby rendered the distribution of the defendant's assets impossible.

WILLES, J. I am of opinion that the plaintiff is entitled to our judgment. The case does not fall within the 178th section, because the covenant is to indemnify the plaintiff against debts the plaintiff's liability to which depends upon several contingencies, as whether the company is solvent or not; whether the plaintiff is selected to pay or not; whether the other shareholders are willing and able to contribute in whole or in part. If all these should fall out so that the plaintiff should have to pay, there is still the additional contingency of the defendant's failing to keep him harmless according to his covenant, before the plaintiff would have any claim against the defendant in respect of these debts. Such a liability is not within the act, because it is not a liability to pay money, nor is the contingency such a one as is contemplated by the act. I find it impossible to distinguish this case from *Warburg* v. *Tucker*. (2) Nor can I reconcile with that case Mr. Mellish's contention that the covenant to indemnify is only

(1) 6 D. M. & G. 762, 2 Jur. N.S. 5.

(2) 5 E. & B. 384; E. B. & E. 914; 24 L. J. (Q.B.) 317; 28 L. J. (Q.B.) 56. 1 Jur. N.S. 876, 4 Jur. N.S. 1143

accessory to the debt, and that, therefore, all liability in respect of it ceases when the principal debt is gone. If that were so, the covenant to keep up the policy ought to have been held to fail when the debt for which the policy was a security was barred by the bankruptcy. There is no ground for such a contention, the covenant to indemnify is an additional obligation, and one which does not come within the 178th section of the Bankruptcy Act, 1849. The case of *Mitcalfe* v. *Hanson* (1) appears to have adopted the view taken by the Court of Queen's Bench in *Warburg* v. *Tucker* (2), rather than that taken by this Court in *Young* v. *Winter* (3), where the point was not much pressed, and even apart from that, the case of *Maples* v. *Pepper* (4) seems to me to be conclusive of the question.

With respect to the ingenious argument that the case falls within the 173rd section, it depends on the assumption that the plaintiff in effect stood in the same relation to the defendant as an agent to his undiscovered principal, but such was not the case, the shares were actually transferred to the plaintiff, and the defendant could not have insisted on the mine treating him as the real owner, nor had he any claim or liability in respect of the shares except as between himself and the plaintiff. The defendant therefore is not protected by the 173rd section any more than by the 178th.

KEATING, J. I am of the same opinion. It is well established that the 178th section only applies where there is a liability to pay money on the happening of a single contingency. Here it is not a liability to pay money, and the liability is dependent on a series of contingencies, which have been already adverted to by my Brother Willes. I think that our present judgment is entirely in accordance with the principles laid down in *Warburg* v. *Tucker* (2), and which have been affirmed by the Exchequer Chamber and the House of Lords. With respect to the argument derived from the 173rd section, I agree that although if the premises had been sound, the conclusion might have been inevitable; yet the premises with

(1) Law Rep. 1 H. L. 242.
(2) 5 E. & B. 384; E. B. & E. 914; 24 L. J. (Q.B.) 317; 28 L. J. (Q.B.) 56.
(3) 16 C. B. 401; 24 L. J. (C.P.) 214.
(4) 18 C. B. 177; 25 L. J. (C.P.) 243.

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respect to the relation of the mortgagor and mortgagee of the shares having failed, the conclusion also fails. Our judgment must be for the plaintiff.

Judgment for the plaintiff.

Attorneys for plaintiff: *Lawrence, Plews, & Boyer.*
Attorneys for defendant: *Pownall, Son, Cross, & Knott.*

June 20.

THE MAYOR, COMMONALTY, AND CITIZENS OF THE CITY OF LONDON, APPELLANTS; THE CHURCHWARDENS AND OVERSEERS OF THE PARISH OF SAINT ANDREW, HOLBORN, RESPONDENTS.

Lands Clauses Consolidation Act, 1845 (8 & 9 *Vict. c.* 18), *s.* 133—*Poor-rate—Assessment.*

4 Ex 305-6
16 B 711
7 Ex 251
16 C 82

Section 133 of the Lands Clauses Consolidation Act, 1845, provides that "if the promoters of the undertaking become possessed by virtue of this or the special act, or any act incorporated therewith, of any lands liable to be assessed to the poor's-rate, they shall . . . until the works shall be completed . . . be liable to make good the deficiency in the assessments for poor's-rate, by reason of such lands having been taken or used for the purposes of the works":—

Held, that the promoters are not liable, under this section, to be rated to the relief of the poor in respect of such lands.

CASE stated under 12 & 13 Vict. c. 45, s. 11, on appeal to the quarter sessions for the city of London against a poor's-rate made by the respondents.

The corporation of the city of London were rated in the rate appealed against as the occupiers of certain land and houses in the parish of St. Andrew, at 7*d.* in the pound, upon the rental and value of the land and houses appearing in the poor-rate in existence at the time of the passing of the Holborn Valley Improvement Act, 1864. The corporation became possessed of the land and houses, which were at that time assessed to the poor's-rate of the parish of St. Andrew, under the Holborn Valley Improvement Act, 1864, which empowered them (amongst other things) to make a viaduct across the Holborn Valley, and to take lands and houses for that purpose. The works of the corporation under this act were in progress, and the houses had been taken down.

No portion of the land in question was beneficially occupied by the corporation, and therefore they would not be liable to be rated to the relief of the poor but for s. 133 of the Lands Clauses Consolidation Act, 1845 (1), which is incorporated in the Holborn Valley Improvement Act, 1864.

The corporation were willing to make good the deficiency of the poor's-rate caused by reason of the land and houses having been taken for the purposes of their works, but they refused to pay the rate, as they had no beneficial occupation of the property.

If the corporation were liable to be thus rated, they would be liable to be also rated in respect of this property to several other rates which are to be made on the persons assessed to the poor's-rate.

The question for the opinion of the Court was, whether the corporation were liable to be rated to the relief of the poor in respect of the land and houses, or whether, without being rated, they should, until the works were completed, only make good the deficiency in the poor's-rate by reason of the land and houses being taken by them.

Poland, for the appellants. It is admitted that the corporation would not be liable to be rated if it were not for s. 133 of the Lands Clauses Act, 1845, because they have no beneficial occupation. That being so, the only question is, does this section render them liable to be rated? There is nothing in the section which can be construed to mean this. It is not disputed that the corporation is liable "to make good the deficiency," but it is not necessary that they should be rated in order to do this. [He was then stopped by the Court.]

Macnamara, for the respondents. All persons liable to contri-

(1) 8 & 9 Vict. c. 18, s. 133, enacts that, "If the promoters of the undertaking become possessed by virtue of this or the special act, or any act incorporated therewith, of any lands charged with the land-tax or liable to be assessed to the poor's-rate, they shall from time to time, until the works shall be completed and assessed to such land-tax or poor's-rate, be liable to make good the deficiency in the several assessments for land-tax and poor's-rate by reason of such lands having been taken or used for the purposes of the works, and such deficiency shall be computed according to the rental at which such lands, with any building thereon, were valued or rated at the time of the passing of the special act," &c.

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bute to the relief of the poor are liable to be rated. There are no prohibitory words in s. 133 to shew that the appellants are not to be rated, therefore it is to be assumed that the ordinary rules apply, and they are liable to contribute to the relief of the poor in the ordinary way.

BOVILL, C.J. I think the appellants are entitled to our judgment. The corporation are liable, under s. 133, to make good the deficiency in the poor-rate caused by the land in question having been taken for the purposes of their works, but this does not render them liable to be rated.

WILLES, J. I am of the same opinion. The statute means that the corporation must pay so as to make up any deficiency in respect of the houses they have pulled down, not that they should be rated to the relief of the poor.

MONTAGUE SMITH, J. I am of the same opinion. The statute seems to contemplate that a deficiency will be occasioned in the assessments for the poor's-rate, by the operations of the promoters, and makes provision accordingly.

Judgment for the appellants, with costs.

Attorney for appellants: *T. J. Nelson.*
Attorneys for respondents: *J. & M. Pontifex.*

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June 20.

Right of Way—User—Prescription—Excess.

The defendant being entitled by immemorial user to a right of way over the plaintiff's land from field N., used the way for the purpose of carting from field N. some hay stacked there, which had been grown partly there and partly on land adjoining. The jury found in effect that the defendant in so doing had used the way bonâ fide, and for the ordinary and reasonable use of field N. as a field:—

Held, that the mere fact that some of the hay had not been grown on field N. did not make the carrying of it over the plaintiff's land an excess in the user of the right of way.

DECLARATION for trespass to land.

Fifth plea, that one Ann Morgan was owner in fee of certain land, and was entitled by immemorial user to a right of way over the plaintiff's land, on foot, and with waggons, carts, and horses, to a public highway from her said land, for the more convenient occupation thereof; that Ann Morgan demised this land with its appurtenances to one Jenkins; and that the alleged trespasses were the use of the right of way by the defendant, as the servant of Jenkins.

Issue and new assignment of excess in the user of the way.

At the trial before Pigott, B., at the spring assizes for Monmouthshire, the following facts were proved:—Ann Morgan was owner in fee of a field called the Nine acre field, and of two other fields adjoining, called Parrott's land. These three fields were in the occupation of R. Jenkins. There was from time immemorial a right of way on foot, and for waggons, carts, and horses, from the Nine acre field over the plaintiff's land to a public highway. There was no right of way over the plaintiff's land from Parrott's land. In the summer of 1866, Jenkins mowed the Nine acre field and Parrott's land, and stacked all the hay upon the Nine acre field. In September, 1866, Jenkins sold the hay to the defendant, who carted it over the plaintiff's land to the highway, which was the alleged trespass.

The jury found, first, that there was an immemorial right of way from the Nine acre field to the highway; secondly, that the stacking of the hay was done honestly, and not to get the way further

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on; thirdly, that there was no excess in the user of the way by the defendant, apart from the question of defendant's right to cart the hay grown on Parrott's land over the plaintiff's land; fifthly, if Parrott's land hay could not be legally carried over the plaintiff's land, then damages 40*s.*

Pigott, B., directed a verdict for 40*s.* to be entered for the plaintiff, with leave to the defendant to move to enter the verdict for him.

A rule having been obtained accordingly,

Huddleston, Q.C., and *Jelf* (*J. O. Griffits* with them), shewed cause. The question in this case is, whether the carrying over the plaintiff's land of the hay grown on Parrott's land is an excessive user of the right of way from the Nine acre field. This is a pure question of law. In order to decide this we must ascertain what is the right over the plaintiff's land which the defendant was entitled to exercise. It is admitted that there is a right of way only from and to the Nine acre field. It is clear, therefore, that this way could not be lawfully used for the purpose of going to any place beyond the Nine acre field: *Howell* v. *King* (1); *Lawton* v. *Ward* (2); *Skull* v. *Glenister*. (3) The right proved is also limited to a right of way for the use of the Nine acre field as a field. Use of a way for certain purposes does not necessarily prove a right of way for all purposes: *Cowling* v. *Higginson*. (4) The extent of the user is evidence of a right only commensurate with the user: *Ballard* v. *Dyson*. (5) At the trial no right of way was proved except for the use of the Nine acre field in the ordinary course of agriculture. The stacking of the Parrott's land hay upon the Nine acre field was the use of the Nine acre field as a stack-yard for the enjoyment of other land, and cannot be said to be for the more convenient use of the Nine acre field itself, and therefore the way cannot be legally used for carrying away that hay. If the plaintiff's land could be used as a way for produce brought from land other than the Nine acre field, a burthen would be cast on the plaintiff's land, in addition to the burden to which it is subject in favour of the Nine acre field. If

(1) 1 Mod. 190. (2) 1 Ld. Raym. 75.
(3) 16 C. B. (N.S.) 81; 33 L. J. (C.P.) 185.
(4) 4 M. & W. 245. (5) 1 Taunt. 279.

the defendant's contention were allowed to prevail, there would be no limit to the increase of the burthen which might be thus cast upon a servient tenement. Suppose, for instance, that the hay of a great number of the adjoining fields were stacked on the Nine acre field, and that it, in fact, was used as a stack-yard, could it be contended that the plaintiff's land was subject to the burthen of having all this hay carted over it? Or, if a manufactory were erected on the Nine acre field, could it be argued that the plaintiff's land could be used as a way for the purposes of the manufactory? It is clear that in neither of these cases could the burthen on the servient tenement be thus increased. Yet the defendant's contention must go to this length, or it falls to the ground altogether. This is a question of law, because this is a way by prescription which presupposes a grant. The construction of such a grant, if one really existed, would be for the Court only, and therefore the construction of the supposed lost grant must be for the Court too. If there were at present in existence a grant of a right such as has been proved in this case the plaintiff would be entitled to keep the verdict upon the construction that the Court would put upon such a deed: *Henning* v. *Burnet* (1); *Allan* v. *Gomme* (2); *Dand* v. *Kingscote.* (3) This rule should be discharged because the way in question was used in fact as a way from Parrott's land, and this was an excess of user by the defendant, and the plaintiff is therefore entitled to damages for the trespass.

Gilmore Evans (*H. Matthews* with him). This is a question of fact and not of law, and the jury have found the facts in the defendant's favour. There is no dispute that there is only a right of way from the Nine acre field. It is admitted also that the right of way must be used for the more convenient use of the Nine acre field as a field, and for agricultural purposes. It is not contended that there would be a right of way for purposes of trade or manufacture. Whether there has been an ordinary and reasonable use of the way for the more beneficial enjoyment of the Nine acre field, is a question of fact for the jury: *Hawkins* v. *Carbines.* (4)

(1) 8 Ex. 187.
(2) 11 Ad. & E. 759.
(3) 6 M. & W. 174.
(4) 27 L. J. (Ex.) 44.

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In *Lawton* v. *Ward* (1) it is suggested in a note that the true point to be considered in such a case is "quo animo the party went to the close; whether really and bonâ fide to do business there, or merely in his way to some more distant place." *Skull* v. *Glenister* (2) is really in the defendant's favour, because it was there held that it was properly left to the jury to say whether the use of the road in that case was a bonâ fide exercise of the right of way, or a mere colourable use of it, for purposes other than those to which the right extended. The only matter in issue is therefore a question of fact, and as to this, the finding of the jury is conclusive. They have found that the stacking of the Parrott's land hay upon the Nine acre field was done honestly, and not to get a way further on, and that there was otherwise no excess in the user of the way. The effect of this finding is, that the defendant used the way in a reasonable and proper manner, and bonâ fide in the ordinary use of the Nine acre field as a field. That being so it was for the defendant to prove some excess of user, and as he has failed to do so, the defendant is entitled to have this rule made absolute.

13 C.B. 804

BOVILL, C.J. In all cases of this kind which depend upon user the right acquired must be measured by the extent of the enjoyment which is proved. When a right of way to a piece of land is proved, then that is, unless something appears to the contrary, a right of way for all purposes according to the ordinary and reasonable use to which that land might be applied at the time of the supposed grant. Such a right cannot be increased so as to affect the servient tenement by imposing upon it any additional burthen. It is also clear, according to the authorities, that where a person has a right of way over one piece of land to another piece of land, he can only use such right in order to reach the latter place. He cannot use it for the purpose of going elsewhere. In most cases of this sort the question has been whether there was a bonâ fide or a mere colourable use of the right of way. That was the question in *Skull* v. *Glenister* (2), and on which the case was ultimately decided. This question is excluded here by the finding of the jury.

(1) 1 Ld. Raym. at p. 75.
(2) 16 C. B. (N.S.) 81; 33 L. J. (C.P.) 185.

With respect to the purposes for which the land was used, it is agreed on both sides that that question was raised and discussed at the trial, and the question whether there had been any excess in the user of the right of way, and also the question of the bona fides of Jenkins in stacking the hay, were left to the jury. The question, therefore, of what was the ordinary and reasonable use of the land, was practically left to the jury. They found that Jenkins acted honestly, and that is equivalent to finding that what had been done was done in the ordinary and reasonable use of the land to which the right of way was claimed, and in the ordinary and reasonable use of the right of way itself. It was for the plaintiff to shew that there had been some excess of user on the part of the defendant, as by shewing that the user of the right of way was only colourable, or that the Nine acre field was used for purposes other than those included in the ordinary and reasonable use of the land. The finding of the jury excludes both these questions. In considering the matters submitted to them the jury must have had to consider whether any additional burthen had been cast upon the servient tenement. This was a necessary element for them to take into consideration in deciding whether there had been only an ordinary and reasonable use of the land in question. If no additional burthen was cast upon the servient tenement the jury might well find that there had been only the ordinary and reasonable use of the right of way. On the whole, the right of way being established, and the plaintiff not shewing any excess in the user, I think the defendant is entitled to the verdict, and this rule must therefore be made absolute.

WILLES, J. I am of the same opinion. The distinction between a grant and prescription is obvious. In the case of proving a right by prescription the user of the right is the only evidence. In the case of a grant the language of the instrument can be referred to, and it is of course for the Court to construe that language; and in the absence of any clear indication of the intention of the parties, the maxim that a grant must be construed most strongly against the grantor must be applied. Accordingly, in *South Metropolitan Railway Company* v. *Eden* (1), where a grant was produced without

(1) 16 C. B. 42.

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stating the object of the grant, it was the opinion of the judges that the grant was general, and that the way in that case might be used to any part of the land to which the way was granted.

I agree with the argument of Mr. Jelf that in cases like this, where a way has to be proved by user, you cannot extend the purposes for which the way may be used, or for which it might be reasonably inferred that parties would have intended it to be used. The land in this case was a field in the country, and apparently only used for rustic purposes. To be a legitimate user of the right of way, it must be used for the enjoyment of the Nine acre field, and not colourably for other closes. I quite agree also with the argument that the right of way can only be used for the field in its ordinary use as a field. The right could not be used for a manufactory built upon the field. The use must be the reasonable use for the purposes of the land in the condition in which it was while the user took place. A right of way by user was here proved, and I think the verdict of the jury excludes the excess of the user charged by the plaintiff. Honest user of the Nine acre field must have been understood by the jury in the large sense of bonâ fide and reasonable, not a user in order to get an advantage to which the defendant was not entitled. The finding of the jury was, that the land was used honestly, and not in order to get a right of way further on. This is equivalent to finding that the stacking of the hay on the Nine acre field was in the reasonable and ordinary use of it as a field; also that the carting was from the Nine acre field and not from Parrott's land. I think both these propositions are included in the finding. I think, therefore, that the rule must be made absolute. We could not refuse this without splitting straws on a subject which ought to be dealt with substantially. The case has been well argued on both sides, and Mr. Jelf has said all that could be said for the plaintiff.

MONTAGUE SMITH, J. The proposition contended for by Mr. Jelf in his able argument is, that this question is to be decided by us as a matter of law. I think that is not so. It is an admitted fact that some of the hay carried from the Nine acre field was grown on Parrott's land, and the carrying away of this hay is the excess in the user of the right of way which is complained of.

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This alone, however, does not determine the question for the plaintiff. The question is for the jury, whether the stacking of the hay in question and the carrying of it away was in the ordinary and reasonable use of the Nine acre field. The jury have found that there is an immemorial right of way over the plaintiff's land for carts, carriages, and horses, for the more convenient use and occupation of the Nine acre field. Before the jury could decide whether there had been any excess in the user of the right by the defendant they must have decided the extent of the right of way. The way here is claimed for the more convenient use of the Nine acre field. The circumstances under which the hay was stacked, and the purpose and object of the defendant in carrying it away, are questions for the jury. As I read the finding of the jury, the stacking and the subsequent dealing with the hay were in the honest and reasonable use of the Nine acre field. It was for the plaintiff to prove affirmatively upon this issue that there had been some excess of user by the defendant, but he has not done so; on the contrary, the jury have found against him. I think, therefore, the rule must be made absolute.

Rule absolute.

Attorney for plaintiff: *Benjamin Hunt, for Prothero & Fox.*
Attorneys for defendant: *Doyle & Edwards.*

GARRETT *v.* MESSENGER.

May 30.

Penalties under 25 *Geo.* 2, *c.* 36, *not cumulative—Music and Dancing in Unlicensed House.*

A common informer having recovered in an action from the defendant the penalty of 100*l.* incurred under 25 Geo. 2, c. 36, s. 2, for keeping a house for public dancing and music without the requisite licence:—

Held, that only one penalty was recoverable; and that a second action by another common informer to recover a like penalty was not maintainable.

DECLARATION, that the defendant was indebted to the plaintiff in the sum of 100*l.*, being forfeited by 25 Geo. 2, c. 36, s. 2.

Plea, never indebted.

This and another action (*Frailing* v. *Messenger*) were brought

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by common informers to recover a penalty of 100*l.* imposed by the 25 Geo. 2, c. 36, s. 2, for allowing music, dancing, and singing in a public-house, in St. George's-in-the-East, London, kept by the defendant, not being licensed for that purpose.

The two actions were tried together before Willes, J., at the sittings at Westminster in Easter Term, and a verdict was taken for the plaintiff in *Frailing* v. *Messenger;* and the learned judge ruled that the penal powers of the act were exhausted by the recovery of one penalty, and he directed a verdict to be entered for the defendant in the present action, and reserved leave to the plaintiff to move to enter it for him, and leave to the defendant to add a plea that one penalty had been recovered for the same offence in the action of *Frailing* v. *Messenger.*

May 3. *Besley,* for the plaintiff, moved accordingly. Under the 25 Geo. 2, c. 36, s. 2 (1), a penalty is incurred for each day on which the house is kept open for the prohibited purpose. A single instance of allowing music or dancing might not render a person liable to the penalty: *Marks* v. *Benjamin* (2); but here the evidence shewed a continuous keeping open the house for music and dancing for a very long period of time, and during two licensing periods. The defendant committed a fresh offence on each day

(1) Section 2, after reciting that "the multitude of places of entertainment for the lower sort of people is another great cause of thefts and robberies, as they are tempted to spend their small substance in riotous pleasures, and in consequence are put on unlawful methods of supplying their wants and renewing their pleasures," in order "to prevent the said temptation to thefts and robberies, and to correct as far as may be the habit of idleness which is become too general over the whole kingdom, and is productive of much mischief and inconvenience," enacts that "any house, room, garden, or other place, kept for public dancing, music, or other public entertainment of the like kind, in the cities of London and Westminster, or within twenty miles thereof, without a licence had for that purpose from the last preceding Michaelmas quarter sessions," "shall be deemed a disorderly house or place;" and that "it shall and may be lawful to and for any constable or any other person being authorized by warrant, &c., to enter such house or place, and to seize every person who shall be found therein, in order that they may be dealt with according to law;" and that "every person keeping such house, &c., without such licence as aforesaid, shall forfeit the sum of 100*l.* to such person as will sue for the same, and be otherwise punishable as the law directs in cases of disorderly houses."

(2) 5 M. & W. 565.

that he allowed the music and dancing to go on. A rule for a new trial on the ground that the verdict is against the evidence is never granted in an action on a penal statute: *Hall* v. *Green.* (1) "One reason for that rule," says Martin, B., "is obvious, viz. that a fresh action may be brought." That shews that there is nothing to prevent a second action being brought by another person for a separate and distinct offence.

BOVILL, C.J. I am of opinion that there should be no rule. I quite concur in the view taken by my Brother Willes, viz. that one penalty only was incurred by the defendant for keeping open his house for a purpose prohibited by the statute, and that he did not thereby subject himself to cumulative penalties from day to day. If the legislature had intended that there should be more than one penalty, that intention would no doubt have been expressed in clear and unequivocal terms. The question whether an additional penalty was incurred for keeping open the house for music and dancing during the second licensing year does not arise in this case.

BYLES, J. I am of the same opinion. n construing every statute which gives a penalty to a common informer, care must be taken that we do not impose a heavier burthen than the legislature contemplated. Though not subject to a second action, the defendant is not relieved from the consequences of his improper conduct; for, he is still liable to all the pains and penalties due to the keeping a disorderly house, and to an indictment for a common nuisance: *Rex* v. *Higginson.* (2)

KEATING and MONTAGUE SMITH, JJ., concurred.

Rule refused.

Attorney for plaintiff: *W. Hicks.*

(1) 9 Ex. 247. (2) 2 Burr. 1232.

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June 12.

RIGBY AND ANOTHER *v.* DUBLIN TRUNK CONNECTING RAILWAY COMPANY.

RE BUTLER.

Company—Scire Facias—Assets in Ireland.

A. having obtained a judgment against a company for 11,000*l.* moved for a writ of scire facias against a shareholder. The company had no assets in England, but had assets to the amount of 500*l.* in Ireland. There were other creditors of large amounts, one of whom had obtained a rule absolute for a scire facias, with immediate execution against the same shareholder; but the execution had not issued, nor had the amount been paid. A. had obtained rules for writs of scire facias against other shareholders to the amount of 30,000*l.*, which had not yet been argued:—

Held, that the writ of scire facias should issue.

3 QB 48, 50

3 C.B. 291

THIS was a rule for a scire facias against a shareholder. The plaintiff had obtained a judgment against the defendants for 11,000*l.* From the affidavits it appeared that the defendants were an English company, having their chief office in England, and that their shareholders lived there; that they had no property in England, but had a steam-engine and some other assets in Ireland, not exceeding in value, on the whole, 500*l.* There were other large creditors of the company, one of whom had obtained a rule in the Queen's Bench for a writ of scire facias against the same shareholder, and the rule had been made absolute by consent, and immediate execution ordered—the money, however, had not been paid, nor execution actually issued. The plaintiff had obtained rules against other shareholders to the amount of 30,000*l.*, none of which, however, had as yet been made absolute.

Thesiger shewed cause against the rule. A rule having been made absolute to issue execution at the suit of another creditor, the Court will not allow this writ to issue, or the shareholder, when the execution has actually issued, will have to plead a plea puis darein continuance, and pay the costs. He has not paid the amount yet, because it is doubtful whether, as against the other creditors, he would be entitled to pay the money before execution has actually issued. The plaintiff has obtained rules against other shareholders for an amount far exceeding his debt, and the Court

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will not allow a creditor to cause the shareholders unnecessary expense, which would be the case if these rules are made absolute: *Scott* v. *Uxbridge and Rickmansworth Railway Company.* (1) But, further, the plaintiff is not entitled to this remedy, because he has not exhausted the assets of the company: he should have brought an action against the company in Ireland, and issued execution against the property there. In *Kilkenny and Great Southern and Western Railway Company* v. *Feilden* (2), Pollock, C.B., said: "I think that the defendants could not proceed against a shareholder in this country, without first endeavouring to make the judgment available in Ireland." Other cases have proceeded on the assumption that it was necessary to prove that the company had no assets. Thus, in *Hitchins* v. *Kilkenny and Great Southern and Western Railway Company* (3), it was held not sufficient to shew that execution had issued in two counties without effect; and in *Devereux* v. *Kilkenny and Great Southern and Western Railway Company* (4), the Court expressly relied on the admission of the shareholder proceeded against that the company had no assets; while in *Nixon* v. *Kilkenny and Great Southern and Western Railway Company* (5), the plaintiff swore that the company had no assets in England, Ireland, or elsewhere. In *Reg.* v. *Derbyshire, Staffordshire, and Worcestershire Junction Railway Company* (6), followed by *Addison* v. *Tate* (7), the company had, indeed, some assets; but they only amounted to 10*s.* a year, while the debt was 800*l.*, and the Court therefore disregarded them.

Holl, in support of the rule. The fact that the shareholder is liable to another creditor cannot release him from his liability to the plaintiff, until he has actually paid the amount that has not been called up on his shares. The plaintiff is obliged to obtain rules for a larger amount than his debt, because many of the shareholders will have paid other creditors and so cease to be liable, while others may become bankrupt. If he issues too many writs he will have to pay the costs of them. The fact that there is property in Ireland to the value of 500*l.* ought not to affect the question. The

(1) Law Rep. 1 C. P. 596. 12 Jur. N. S. 602. (5) 1 H. & N. 47; 25 L. J. (Ex.) 249. 2 Jur. N. S. 427.
(2) 6 Ex. 81, 85; 20 L. J. (Ex.) 141.
(3) 15 C. B. 459; 20 L. J. (C.P.) 31.
(4) 5 Ex. 834; 20 L. J. (Ex.) 37.
(6) 3 E. & B. 784; 23 L. J. (Q.B.) 333.
(7) 11 Ex. 250; 24 L. J. (Ex.) 249.

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plaintiff was obliged to bring his action in England, where the shareholders lived, and if he were to wait till he had brought an action in Ireland, the other creditors would possess themselves, meanwhile, of all the money due from the shareholders. The property in Ireland is so small, compared with the amount of the plaintiff's debt, as to be almost nominal.

BOVILL, C.J. Several grounds have been urged why this rule should not be made absolute, but none of them, I think, afford an answer to the plaintiff's application. The order for immediate execution, obtained in the Court of Queen's Bench, is no ground for refusing to issue another writ of scire facias, as it has not been carried into effect. That order was made by consent, and the shareholder has not paid the money; and if this rule be refused the order may never be carried out. Then it is objected that the plaintiff has obtained rules for writs of scire facias, claiming a far larger sum than his debt; but none of those rules have yet been made absolute, and the plaintiff is entitled, at any rate, to have rules absolute to the amount of his debt. Then with regard to the property in Ireland, the amount of it is small, and though I would by no means say that, if anywhere abroad there were assets of the company sufficient to satisfy the debt, the Court would, in its discretion, grant a writ of scire facias against a shareholder; yet here, where the property is small, and the claims against the company are very large, I think the writ should issue.

KEATING, J. I am of the same opinion. No doubt there may be difficulties in the present state of the law, but we must deal with it as it is. With respect to the first objection, it did not exist at the time the rule was granted, the application to the Court of Queen's Bench not having been then made. I think that the existence of a rule absolute against the same shareholder at the instance of another creditor affords no answer to such a rule as the present, unless it has been followed by payment, and even then, though the Court would not make the rule absolute, they might discharge it upon terms. The shareholder might have safely paid the amount due from him on the judgment in the Queen's Bench without waiting for execution to issue, and should have done so if he really

wished to prevent this rule being made absolute. As to the property in Ireland, we by no means wish to lay down that if the company had substantial assets in Ireland we should allow a scire facias to issue, but here the assets are totally inadequate to satisfy the debt, and it would, I think, be to exercise our discretion most oppressively to require a creditor for 11,000*l.* to bring an action in Ireland to exhaust assets amounting to only 500*l.* before proceeding against the English shareholders.

MONTAGUE SMITH, J. I am satisfied that the rule should be made absolute. The first objection is that an order for execution to issue has been obtained in the Court of Queen's Bench. If the money of the shareholder remaining unpaid on his shares had been actually attached, or if it had been paid, or tendered to the creditor, there would be ground for opposing this rule, but such is not the case. It is clear that payment under an order of the Court of Queen's Bench would be good payment, and discharge the shareholder; there is no danger therefore of the shareholders being harassed by several rules being obtained against them if they are really willing to pay the amount due from them. As to the second point, that there is some property of the company in Ireland, it seems to me that its existence does not take away the jurisdiction of this Court. The judgment is an English judgment, and there is no property in England; there is, therefore, in the words of the act (8 & 9 Vict. c. 16, s. 36), "not sufficient whereon to levy execution," and the Court has therefore jurisdiction. I quite agree that if there were enough property to satisfy the whole or any great part of the debt, the Court, in its discretion, ought not to allow the writ to issue, but that is not so in the present case. The question whether writs should issue for, in the aggregate, more than the amount of the debt does not arise in this case, as none of the rules that have been obtained have as yet been made absolute.

Rule absolute.

Attorneys for plaintiff: *P. & W. B. Nelson.*
Attorneys for shareholder: *Linklaters, Hackwood, & Addison.*

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PORTER *v.* KIRKUS.

Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134), *ss.* 192—197—*Bankrupt Law Consolidation Act*, 1849 (12 & 13 *Vict. c.* 106), *s.* 145—*Lease—Landlord and Tenant.*

The 145th section of the Bankrupt Law Consolidation Act, 1849, applies to deeds registered as mentioned in s. 197 of the Bankruptcy Act, 1861.

The defendant, plaintiff's lessee, duly registered a deed under s. 192 of the Bankruptcy Act, 1861, by which he conveyed "all his estate and effects" to trustees for the benefit of creditors:—

Held, that s. 145 of 12 & 13 Vict. c. 106, applied, and that the conditions of that section being satisfied, he was discharged from liability under the lease.

DECLARATION, for three quarters' rent in arrear, due respectively on the 24th of June, 29th of September, and 25th of December, 1866, under a lease for twenty-one years from the 29th of September, 1865.

Plea: 1. As to the rent due on the 24th of June, 1866, that on the 18th of September, 1866, the defendant executed a deed under the Bankruptcy Act, 1861, which was duly assented to and registered, by which he conveyed "all his estate and effects" to trustees for the benefit of his creditors, and by which his creditors released all "their respective debts, in like manner as if the said W. Kirkus had obtained a discharge in bankruptcy."

2. As to the two quarters' rent due on the 29th of September, and the 25th of December, 1866; the second plea, repeating the averments in the first plea, averred that the trustees elected to take the lease, and that the rent accrued after the execution and registration of the deed.

3. To the same part of the first count the third plea, repeating the averments in the first plea, averred that the trustees declined to take the lease, and that within fourteen days after defendant had notice thereof, he was ready and willing, and offered to deliver up the lease to the plaintiff, together with possession of the premises, but the plaintiff refused to accept them; and he has always since been, and still is, ready and willing, whereof the plaintiff has always had notice, and that the said rent accrued due after the execution and registration of the deed.

Demurrer to the second and third pleas and joinder.

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The ground of the demurrers was, that the 145th section of the Bankrupt Law Consolidation Act, 1849, does not apply to the case of deeds registered as mentioned in s. 197 of the Bankruptcy Act, 1861.

Butt supported the demurrers, and cited *Walker* v. *Nevill.* (1)

J. Brown, Q.C., supported the pleas, and cited *Topping* v. *Keysell* (2); *Copeland* v. *Stephens* (3); *Wood* v. *De Mattos* (4), and s. 129 of the Bankruptcy Act, 1861.

Butt, in reply, cited *Holland* v. *Cole.* (5)

BOVILL, C.J. There may be a difficulty in some cases in saying what particular provisions of the bankruptcy law are intended to be incorporated with and made applicable to the provisions as to trust deeds; but the present case presents no such difficulty. The 145th section of the act of 1849, gives certain powers to assignees in bankruptcy where the bankrupt's estate comprises a lease or agreement for a lease at a rent. Here the deed makes an assignment of the whole of the debtor's estate and effects to trustees, who under it represent the assignees in bankruptcy. Such trustees are placed for many purposes on the same footing with assignees, and the question is, whether they are so placed with reference to s. 145. It was clearly the object of the legislature that the provisions of the bankruptcy acts should, as far as possible, apply to the case of trust deeds. It appears to me that s. 145 is one of those applicable, and I therefore think that our judgment ought to be for the defendant.

MONTAGUE SMITH, J. I am of the same opinion. The deed contains an appointment of trustees for the creditors, and an assignment to them of the debtor's estate and effects; the deed is registered, and the effect of s. 197 of the act of 1861 is to make s. 145 of the act of 1849 applicable; and if there is any case of a deed where that section could be applicable, it is this case. It is argued that there would be an incongruity in so holding, because the trustees have, by executing the assignment, deprived themselves

11 Jur. N.S. 246.

(1) 3 H. & C. 403; 34 L. J. Ex. 73.
(2) 16 C. B. (N.S.) 258; 33 L. J. (C.P.) 225. 10 Jur. N.S. 774.
(3) 1 B. & Ald. 593.
(4) Law Rep. 1 Ex. 91. 12 Jur. N.S. 578; 14 Jur. N.S. 1066
(5) 31 L. J. (Ex.) 481.

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of the power of election; whereas s. 145 assumes the assignees to have such a power. But the effect of the deed is not to deprive the trustees of this power. The lease is not specifically assigned, but it is assigned as part of the estate, subject to the provisions of the statute, one of which provisions is, that where a lease forms part of the assets, a power of election is given to the trustees. There is therefore no incongruity in holding thus, but we are acting in analogy with what occurred where, under the old law, an actual assignment by deed was made by the debtor to the effect now brought about by the statute.

Another ground urged upon us was, that the deed contained a release of debts, which could apply only to past rent; that accruing rent could not be affected; and that only so many of the bankruptcy clauses were to be applied as were necessary to give effect to the particular deed. But the release is only a part of the deed and the special powers of s. 145 are no more dependent on the release in a deed, than in the case of bankruptcy they are upon the bankrupt's discharge. It is an appropriate and independent provision, coming into effect as soon as the bankruptcy is decreed, or, by analogy, as soon as the deed is registered.

There is a clear distinction between this case and *Holland* v. *Cole* (1), in the Exchequer. There it was held that the assignment was a forfeiture, and this is perfectly consistent with our judgment, for there the forfeiture was completed as soon as the deed was executed; but this provision does not come into operation till the deed is registered. Here there is no pretence for saying that the lease was forfeited; but as soon as the deed was registered s. 197 of the act of 1861 brought s. 145 of the act of 1849 into operation; and we must therefore allow the defendant's answer to the landlord's claim.

Judgment for the defendant.

Attorneys for plaintiff: *Walker & Twyford.*
Attorney for defendant: *T. Clark.*

(1) 31 L. J. (Ex.) 481.

WATSON *v.* MID WALES RAILWAY COMPANY.

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Equitable Set-off—Assignment of Chose in Action—Lloyd's Bond.

When an equitable chose in action has been assigned, the debtor cannot set off against the assignee a debt which has accrued due to him from the assignor since the notice of assignment, though resulting from a contract entered into previously, unless from the nature of the transaction it appears to have been intended between the original parties that the one should be set off against the other.

The assignees of a Lloyd's bond sued the makers in the name of the original bondholder; the makers sought to set off arrear of rent due from the original bondholder, which had accrued due since notice of the assignment, upon a lease granted after the making of the bond, but before notice of assignment. On equitable pleadings stating these facts:—

Held, that the defendants could not set off the arrears of rent.

DECLARATION, on four Lloyd's bonds, dated the 18th of March, 1865, by each of which the defendants acknowledged themselves indebted to the plaintiff in the sum of 5000*l.* for work and labour, and covenanted for the payment of that sum with interest, at the expiration of one year from the date.

Second plea, to the whole claim, a set-off of two quarterly payments of rent in arrear, due from the plaintiff to the defendants under a lease, made by them to him (under parliamentary powers) on the 22nd of March, 1865, of the defendants' undertaking, lines of railway and rolling stock, for twenty-one years from the 1st of January, 1865, at a certain rent payable quarterly on the 1st of January, 1st of April, 1st of July, and 1st of October, in every year.

Replication, on equitable grounds, that before the accruing of the debts sought to be set off, the debts sued for, and all the plaintiff's interest in them, were assigned by him to the Joint Stock Discount Company, Limited; that the defendants had notice of it and assented to the assignment before the accruing of the debts sought to be set off; that the Joint Stock Discount Company, Limited, had no notice of the lease in the plea mentioned at the time of the assignment; and that the action was brought on their behalf, and with their consent, and for their sole benefit.

Demurrer and joinder.

Rejoinder, on equitable grounds, that the deeds declared upon

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were made before the making and approval of the lease mentioned in the plea; but the debts acknowledged by the deeds were first assigned to the Joint Stock Discount Company, Limited, after the making and approval of the lease, and during the existence of the demise, and during one of the quarters in respect of which one of the quarterly payments mentioned in the plea accrued due; and that defendants never assented to the assignment otherwise than by the formal registration of the same in their books, according to their usual practice in such cases, and on the application and request of the Joint Stock Discount Company, Limited.

Demurrer and joinder.

Lord, in support of the equitable replication and of the demurrer to the rejoinder. The question on both demurrers is the same, and it is, whether a debtor has, in equity, a right to set off against the assignee of his debt a debt to him from his original creditor, which has accrued due subsequently to the notice to him of the assignment, but which resulted from a liability existing previously. The negative of this proposition, for which the plaintiff contends, is founded upon two rules; first, that in equity, from the moment of notice, the assignee, and not the assignor, is owner of the debt; secondly, that no set-off exists between an absolute debt and a liability which may, or even which must, terminate in a debt. Hence it follows, that although the assignee (the real plaintiff) took the debt sued on subject to all existing equities, if any, yet in fact none here existed; since, by the second proposition, there was at that time no right of set-off in the debtors (the defendants); and having thus taken the debt clear, then, by the first proposition, the plaintiff's rights could not be limited by anything occurring subsequently (such as the accrual of a debt) between the assignor and his debtor, any such occurrence being res inter alios acta.

The second proposition is established by *Jeffryes* v. *Agra and Masterman's Bank* (1), where the question arose as to the defendants' right to a set-off in respect of liabilities of the assignor which were current, but had not accrued due at the time when the money claimed by the plaintiff (the assignee) became payable; and

(1) Law Rep. 2 Eq. 674.

it was determined that no such set-off could be maintained, the defendants failing to prove any special contract to that effect. The general principle involved in the first proposition is broadly stated in *Stephens* v. *Venables* (1), where executors were allowed to set off against the assignee of a legacy rent due to them from the legatee before the notice of assignment, but not that which became due subsequently; thus pointing out the date of notice as the period which fixes the rights of the parties. The same principle as to notice is accepted and acted upon at common law in *De Pothonier* v. *De Mattos* (2), where a release obtained from the original creditor, after notice of the assignment, was held invalid; and in *Wilson* v. *Gabriel* (3), where the set-off was allowed of a debt which accrued after assignment, but not after notice, Blackburn, J., said: "It is perfectly clear in equity that, from the moment the assignment of a chose in action is notified to the party concerned, the assignee is owner of that contract and all belonging to it."

But further, the general rule, that "a chose in action assignable only in equity must be assigned subject to the equities existing between the original parties to the contract," is a rule "which must yield where it appears from the nature or terms of the contract that it must have been intended to be assignable free from and unaffected by such equities," per Turner, L.J., in *Re Agra and Masterman's Bank, Ex parte Asiatic Banking Corporation* (4); and that limitation to the rule was there applied to exclude set-off. Now, the instrument sued on here is one which in its nature must have been intended to be negotiable, though not assignable in the strict legal sense; and it could never have been intended by the makers that such an instrument should be subject to equities of which the ultimate holders cannot possibly have any knowledge or suspicion. The intended negotiability of these instruments is recognised in *Chambers* v. *Manchester and Milford Railway Company* (5), by Blackburn, J., and it is obvious that their efficiency would be much diminished if such set-offs were allowed.

[WILLES, J., referred to Byles on Bills, 9th ed. p. 161, as to the effect of the transfer of overdue bills.]

(1) 30 Beav. 625.
(2) E. B. & E. 461; 27 L.J. (Q.B.) 260.
(3) 4 B. & S. 243, at p. 248.
(4) Law Rep. 2 Ch. Ap. 391, at p. 397.
(5) 5 B. & S. 588, at p. 611.

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Lastly, if the date of the bond is to be taken (and it acknowledges an existing liability), then it is clear no set-off can arise.

Macnamara (*The Solicitor General* (*Sir J. B. Karslake*) with him), in support of the rejoinder and the demurrer to the replication. The true rule is, that on the one hand the assignee of a chose in action not assignable at law takes it subject to all equities then subsisting between the original parties, or which may come into being before notice of the assignment, and that, on the other hand, he cannot be affected by any contract entered into between them after the date of that notice. But contracts made before the assignment, not yet ripened into actual debts, but which will constitute a debt before the date when the assigned debt becomes due, give rise to such equities. For they were probably entered into by the original debtor with a view to the security for their satisfaction which he would derive from his own condition of indebtedness, consisting in the power he would have of setting off the debts accrued to him against the demand of his original creditor. This view is expressed by Wood, V.C., in the case cited of *Jeffryes* v. *Agra and Masterman's Bank* (1); and that case is itself an authority for this position, for though no set-off was allowed of liabilities not accrued due at the date of payability of the original debt, yet liabilities resulting from contracts entered into previously to the notice of assignment, and which matured before that date, were allowed to be set off. Now here the contract founding the set-off was entered into before notice of the assignment, and it ripened into a debt before the date of payment of the original debt; it is therefore within the principle of that case. The fallacy of the opposite contention is in restricting the equities existing at the time of notice to sums then due, instead of including in them debts arising out of those existing contracts which will become due before the date of payment. The principles insisted on are recognised in general terms in *Coles* v. *Jones* (2) and *Turton* v. *Benson*. (3)

[WILLES, J. In the former case there was something in the nature of a charge; in the latter, the equity which bound the assignee was the result of fraud in the original contract.]

(1) Law Rep. 2 Eq. 674, at p. 680. (2) 2 Vern. 692.
(3) 2 Vern. 764, at p. 765.

In *Mangles* v. *Dixon* (1) and in *Smith* v. *Parkes* (2) such a set-off as is claimed here was allowed.

[BOVILL, C.J. It appears that in the former case the contract out of which the set-off arose, was part of the same transaction which created the debt assigned. Indeed, Lord Cottenham says (3), that it is not a case of set-off at all, and that "the freight never became due in equity from the Messrs. Mangles, because the agreement was, that they never were really to pay it;" and in the latter case it is also expressly said by the Master of the Rolls that the set-off flowed out of the same transaction as the debt. (4)]

It cannot be a material circumstance that the debts have the same origin. In law it makes no difference; and the only circumstance which would take away the right of set-off in equity would be non-communication to the assignee of the accruing liability. But that circumstance did not take away the right to set-off in *Mangles* v. *Dixon*. (5) As to the suggestion that the parties meant to exclude a right of set-off by the defendants, there is nothing on the face of the bond to shew it, and it cannot be implied.

Lord, in reply. As to *Jeffryes* v. *Agra and Masterman's Bank* (6), it does not clearly appear that any liabilities actually accrued due between the notice of assignment and the date of payability. In *Smith* v. *Parkes* (2) the set-off allowed was a debt actually due at the date of the instrument creating the debt claimed, viz. the deed of the 23rd of December, 1846, the claim upon the earlier bonds of 1845 being rejected: see pp. 118, 119. And in *Coles* v. *Jones* (7), the only set-off allowed was the debt to Jewell, for which the original parties were jointly liable, and against which the assignor had secured his debtor by a note, and it does not appear from the report, that the debt and the note to secure it had not become due at the date of the assignment. The case of *Re Commercial Bank Corporation, &c., Smith, Fleming, & Co.'s Case* (8), governs the present case.

BOVILL, C.J. The question in the case is, whether the plaintiff

(1) 3 H. L. C. 702.
(2) 16 Beav. 115.
(3) 3 H. L. C. at p. 729.
(4) 16 Beav. at p. 119.
(5) 3 H. L. C. 702, at p. 710.
(6) Law Rep. 2 Eq. 674.
(7) 2 Vern. 692, and note (1).
(8) Law Rep. 1 Ch. Ap. 538.

12 Jur. N.S. 806.

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would be entitled in equity to a perpetual injunction to restrain the defendants at law from setting up the counter claim by way of set-off; which again turns on the question of how far such a set-off would be allowed in equity. No case has been cited to us where equity has allowed against the assignee of an equitable chose in action a set-off of a debt arising between the original parties subsequently to the notice of assignment, out of matters not connected with the debt claimed, nor in any way referring to it. The plaintiff has a clear legal right. At the time when the bond was given the lease did not exist; the lease when granted did not refer to the bond; it did not make the rent payable under it a charge on the money secured by the bond; the two instruments were entirely collateral, and had no reference to one another. Under these circumstances, the bond having been assigned and notice given of the assignment, the question arises, how far rent subsequently accruing due under the lease can be set off against the money due upon the bond. Mr. Macnamara was asked whether he could produce any cases which had gone to this extent, and though he had evidently examined the matter with great attention, he was unable to do so. In all the cases cited by him some qualification occurred in the original contract, or the two transactions were in some way connected together, so as to lead the Court to the conclusion that they were made with reference to one another. The strongest case was that of *Smith* v. *Parkes* (1); the report of that case is not very full, but, judging from the language of the Master of the Rolls, the decision went on the footing that both debts arose out of the same partnership dealings and transactions, and were inseparably connected together. That case, therefore, is not applicable to the one before us, where the transactions appear entirely separate, and where we have no allegation or statement from which we can infer any connection to have existed. We have here nothing but a debt or bond, without any limitation, either in the instrument or by any subsequent deed; with nothing like a lien or charge, nor with anything to prevent it from being an absolute and immediate debt. The plaintiff is therefore entitled to our judgment.

WILLES, J. We are called on to decide whether the plaintiff

(1) 16 Beav. 115.

suing at law on this bond, would be permitted in equity to enforce his claim without allowing the set-off pleaded by the defendant. On this question I come to the same conclusion with the Chief Justice.

The question, in fact, amounts to this: whether the assignee of a debt payable in futuro takes it subject to its being a security to the debtor for any payment accruing due under a contract made with him by the assignor before the assignment, and under which the assignor may become indebted to his debtor. Or it may be stated thus: whether, where there are cross debts accruing but not yet due, there is, independently of the legal rights of the parties, a distinct absolute equitable right that the balance only should be considered due. The cases fail to establish any such position, and the right is negatived by the judgment of Lord Cottenham, in *Rawson* v. *Samuel*. (1) It is true that in that case the element existed that not only was the sum claimed to be set off unascertained, but the existence of any balance to be set off depended on the result of an account not yet taken. The case is not, therefore, altogether in point; but the Lord Chancellor went into the cases and denied the doctrine supposed to be established by them, that the mere existence of cross claims gives a right to equitable set-off. On the contrary, what he lays down as the result of his examination is, that without some equitable ground for protection, no such right exists. Now, here there was at the date of notice of assignment a cross claim by the defendants, payable in futuro, and to make this a matter of set-off against the plaintiff it is necessary to shew that in respect of these claims mutual credit was given. When I speak of mutual credit, I do not refer to what are called mutual credits in bankruptcy, because these, existing by legislation, have their operation limited by the statute which creates them. And on this ground, in *Re Commercial Bank Corporation, &c., Smith, Fleming, & Co.'s Case* (2), in a case of winding up, the Lords Justices refused to apply by analogy to them the doctrine of equitable set-off, so as to restrain the liquidator of a company in process of being wound up from negotiating acceptances of the applicants then running, although the company was at the same time liable to the appli-

(1) Cr. & P. 161, at p. 178. (2) Law Rep. 1 Ch. Ap. 538.

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cants upon bills drawn by the company and dishonoured. Using the word, then, not in that sense, but in the sense that the parties have mutually trusted one another to make mutual payments, if there is to be implied, or fairly to be presumed from the transaction, an agreement, or an understanding amounting to a contract, that the one shall go in liquidation of the other, and the balance only be considered as the debt between the parties, then each party has a right to demand that the one claim shall not be enforced independently of the other. But there is no such thing here; the debts were created at different times, they are payable on different days. There is nothing to support the inference that the one was contracted with any reference to the other, or that there was any agreement that the defendants should only pay the balance of the two. Still less is it the case of one of the liabilities being secured by or made a charge upon the other. Neither is it the case of a debt due at the time of the assignment so as to come within the principle of the case of *George* v. *Clagget* (1), and other similar cases. It is the bare case of A. owing B. and B. owing A. debts contracted at different times, and payable at different dates. Judging from the character of the transaction, is there any reason why we should not treat the debts as what they appear to be, distinct and independent debts? If this is so, and the set-off is no parcel of the contract, but only a matter of procedure, there is no reason for binding one debt to the other, so as to prevent the plaintiff from recovering his debt by reason of the defendants being owed something by a third person.

MONTAGUE SMITH, J. I am of the same opinion. If the debt sought to be set off in an action brought on behalf of the assignee of a debt had existed at the time of the transfer, equity would not interfere to restrain the legal set-off which the parties had. But here, at the time of transfer and notice, no debt existed to be set off. It is said that if debts are accruing mutually under independent contracts, neither of which is due at the time of the transfer, the right of set-off exists, if at the time of action brought upon one of them the liability of the other has

(1) 7 T. R. 359.

ripened into a debt actually due. But the time to be looked at is, not the time of action brought, but the time when the transfer was made and notice given, and the rights of parties must be determined by the state of things then existing. Now here the contracts were independent; the debts became due at different times; there is nothing in the replication to shew any ground on which the Court can presume any agreement for set-off between the parties, and I cannot find any decision shewing that under such circumstances any equitable set-off exists as against the equitable rights of the assignee of the debt. In *Rawson* v. *Samuel* (1) the Chancellor says: "We speak familiarly of equitable set-off, as distinguished from a set-off at law; but it will be found that the equitable set-off exists in cases where the party seeking the benefit of it can shew some equitable ground for being protected against his adversary's demand." From the cases on the subject the principle may be deduced that the equitable interests remain after the transfer, subject to all rights which attach upon them until notice. And it is entirely in concurrence with this principle that contracts which are independent of one another should not remain after notice, subject to any new liability. It may be noticed that if the defendants had wished to preserve the security of the debt, they might have required the bond to be so expressed, or have afterwards endorsed the condition upon the bond. I incline to think, however, that no such thing was intended. Our judgment must therefore be for the plaintiff.

Judgment for the plaintiff.

Attorneys for plaintiff: *Lawrance, Plews, & Boyer.*
Attorney for defendants: *S. F. Noyes.*

(1) Cr. & Ph. 161, at p. 178.

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June 3.

CHAMPNEYS, Clerk *v.* ARROWSMITH, Clerk.

Churchyard, in whom vested—New District—Effect of s. 10 *of Lord Blandford's Act,* 19 *&* 20 *Vict. c.* 104.

In 1816, under a local act, a new church was built in St. Pancras, which was to be "the parish church," the old church being thereby converted into a "parish chapel." In 1853, by an order in council, the original burial-place for the parish, which surrounded the old church, and also an additional ground provided under an earlier local act, were closed, and a cemetery was provided for the whole parish. In 1863, that part of the parish in which the old church stood was formed into a new district, and the "parish chapel" was declared to be the church of that district:—

Held, that the 10th section of Lord Blandford's Act, 19 & 20 Vict. c. 104, did not operate to vest the old churchyard in the incumbent of the new district church, but that the freehold thereof still remained in the vicar of the parish.

Affd in Ex Ch, 36 B. 107.

This was an action of trespass brought by the plaintiff to try his right to the freehold of the churchyard of the former parish church, but now the parish chapel, of St. Pancras, hereinafter mentioned. The following case was under a judge's order stated without pleadings:—

1. The plaintiff is the vicar of the parish of St. Pancras, in the county of Middlesex. The defendant is the incumbent of the parish chapel of St. Pancras and of the district chapelry hereinafter mentioned.

2. The said parish chapel was until after the passing of the local act of 56 Geo. 3, c. xxxix, hereinafter mentioned, the parish church of the parish of St. Pancras, and had vaults and a churchyard belonging to it. The said churchyard had theretofore been and was then used as the burying-ground of the parish.

3. All the acts of parliament hereinafter referred to accompanied and were to form part of the case. In some instances the purport only of the different sections is given in the following paragraphs:—

4. By local act 32 Geo. 3, c. lxvi,—after reciting that the churchyard or burying-ground of the parish was too small, and that it was highly necessary that some convenient piece of ground should be provided as and for an additional burying-ground for the use of the parish,—provision is made for the appointment of

a board of trustees to carry out the purposes of the act, and power is given to them to purchase any quantity of land not exceeding two acres, to be used as an additional burying-ground, which was vested in the vicar and churchwardens of the parish and their successors, for the purpose of a burying-ground for the use of the parish, for ever.

5. Accordingly, such quantity of land was duly provided for such additional burying-ground under the said act: and by s. 10 it was in substance provided that the trustees should cause the additional or new burying-ground to be inclosed in such manner as they should think proper with a good brick wall not less than seven feet above the surface, and should build a small residence for the person appointed to take care of the said burying-ground, and make such vaults as they should think proper; and that it should also be lawful for them to fence or inclose the then present churchyard with a brick wall or in such a manner as they should think proper. The said new or additional burying-ground adjoined the then present churchyard; and the trustees inclosed the then present churchyard and the new or additional burying-ground within a wall seven feet high, but did not fence off the one from the other. The boundaries of the respective grounds, however, are either known or capable of ascertainment; and at the time of the passing of the 56 Geo. 3, c. xxxix, and 1 & 2 Geo. 4, c. xxiv, hereinafter mentioned, and thence until the opening of the cemetery at Finchley hereinafter mentioned, the then present churchyard and the said additional or new burying-ground were used as the burying-ground of the parish of St. Pancras.

6. By the local act of the 56 Geo. 3, c. xxxix, provision is made for building a new church, and also a new chapel to be called Camden Chapel, in the parish of St. Pancras. By this act a body of trustees is constituted for carrying out the purposes of the act; and, after providing for the purchase of sites, and for the vesting of them in the trustees, and for the building of the intended church and chapel, it was by s. 42 enacted that "the said new church when built and consecrated shall be called and known by the name of, and to all intents and purposes be, the parish church of the parish of St. Pancras."

7. By s. 44 it was provided, that, after the consecration of the

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new church, the existing church should become a chapel, under the name of, and to all intents and purposes be, the parish chapel of the parish of St. Pancras, and that Divine service should be performed therein, and also all other such duties as the vicar of the parish for the time being should think fit to direct, except the solemnization of matrimony and the publication of banns; with a proviso that nothing in the act contained should affect any right of any person whomsoever in respect of the then present parish church, or the chancel, vaults, or pews of or within the same, or any part thereof. And by s. 45 it was provided that the intended new chapel should be called Camden Chapel in the parish of St. Pancras; and the same provision was made with respect to the performance of Divine service and other duties therein as in the case of the parish chapel.

8. By s. 46 the right to nominate the ministers to the parish chapel of St. Pancras and to Camden Chapel, subject as therein specified, is vested in the vicar for the time being of St. Pancras.

9. By s. 47 it is enacted that, for the maintenance and support of the ministers to the parish chapel and Camden Chapel, the trustees shall, out of the fees to be received and the rates to be made under the now-reciting act, pay to each of such ministers any sum not less than 150*l.* nor more than 200*l.* per annum; and by the 51st section of the subsequent local act, 1 & 2 Geo. 4, c. xxiv, these salaries are directed to be paid out of the pew-rents of the parish church and the parish chapel and Camden Chapel respectively thereby directed to be received by the trustees, if sufficient for that purpose; with a proviso in case of a deficiency which appears in a subsequent part of the case.

10. Section 48 provides for the performance of Divine service in the two chapels.

11. By s. 49 it is enacted "that no christening or christenings shall at any time be solemnized within the said chapels respectively without the special leave of the vicar of the parish previously obtained; but all such christenings shall in every instance be performed (unless such leave be obtained) in the new church, as hitherto performed in the present parish church."

12. By s. 50 the vicar, churchwardens, and sexton of the parish for the time being are to receive the like burial fees and dues from

burials, monuments, &c., within the said intended church and chapels and vaults as were then payable to them respectively in respect of burials, monuments, &c., within the present parish church or burial-ground, or such as might thereafter be settled by the vicar, churchwardens, and the trustees under the now-reciting act, with the consent of the bishop.

13. By s. 51 the vicar of St. Pancras for the time being is impowered to appoint the clerk to officiate in the parish chapel and Camden Chapel.

14. By s. 52 the trustees under the now-reciting act are to set out and allot a pew in the new church and also in the chapels for the vicar, and one other pew in the new church for the churchwardens of the parish; and by s. 42 of the subsequent local act of 1 & 2 Geo. 4, c. xxiv, an additional pew is to be set out in the parish church and each of the parochial chapels for the use of the trustees,—the 28th section o he act having placed all parochial chapels in the parish of St. Pancras under the control of the trustees, with however a reservation of the rights of the commissioners for building churches and of the vicar of the parish for the time being. By s. 53 of the now-reciting act they are also to set out in the new church and chapels a sufficient number of free seats. And by s. 54 they are to let the rest of the pews in the intended church and chapels under such regulations as they may think fit, and to receive the pew-rents; and by s. 55 powers are given to the trustees for recovering arrears of pew-rents, and for re-entering and taking possession of the pews in case of default.

15. By the local act of 1 & 2 Geo. 4, c. xxiv,—after repealing the whole of the local act 32 Geo. 3, c. lxvi, hereinbefore referred to, except so much thereof as related to a footpath which was not material to this case, and so much as enacted that the burying-ground provided by the trustees under the said act should be and remain vested in the vicar and churchwardens of the said parish and their successors for ever for the use of the said parish,—the trustees under the act of 56 Geo. 3, c. xxxix, are appointed trustees for carrying into execution the now-reciting act. By s. 5, the provisions of 56 Geo. 3, c. xxxiv, are continued and incorporated.

16. By s. 36 it is provided that the trustees shall have the same power of selling and disposing of catacombs and vaults which then

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were or thereafter should be made under all parochial chapels then being or thereafter to be within the said parish, as was given to them by the above in part stated act of 56 Geo. 3 with respect to catacombs and vaults constructed under that act.

17. By s. 44 it is enacted that the trustees may fix the fees for interment in the burying-grounds of the parish and in the vaults and catacombs under the church and chapels, and from time to time vary the same. They are also impowered to direct such payments as may be necessary or proper to be made out of the moneys received on account of such fees; and all such fees are to be paid to the churchwardens of the parish, who shall, as therein provided, account to the trustees for the same, and, whenever the same shall amount to 200*l.*, pay the same over to the trustees.

18. By s. 51 it is enacted that the pew-rents of the said new parish church and of all the parochial chapels which now are or hereafter shall be within the said parish, and which are by that act and the last-recited act placed under the management of the trustees (except chapels to be built under the church building acts), shall be applied in payment of the salaries of the ministers who shall do duty in the said chapels, of the clerks, organist, pew-openers, and other persons who shall be employed in the said chapels; such salaries in respect of each chapel to be paid, where practicable, out of the pew-rents of that chapel, but, if they be insufficient, out of the general pew-rent fund; and provision is made for the disposal of any surplus of such fund. The pew-rents of the said parish church, the parish chapel, and certain other chapels not necessary to be particularized, have been and still are administered as a common fund.

19. By s. 53 it is enacted that the fees for burials in the burial-grounds or places of the parish shall, with certain exceptions, be applied, first, in payment of the wages of the sexton and other persons employed on the said burial-grounds and places, the payments in respect of each ground or place being made as far as possible out of its own receipts; secondly, in payment of the expenses of keeping the burial-grounds and places in order; and, thirdly, in the same manner as the surplus of pew-rents is by that act directed to be applied. The burial-grounds or places of the parish were at this time the original churchyard of the old parish

church, which had been used as the only burying-ground of the parish up to the time of the passing of the first above-stated act, the additional or new burying-ground acquired under the provisions of the local act firstly hereinbefore recited, and the vaults and catacombs under the parish church and the several parochial chapels.

20. In 1856 the act 19 & 20 Vict. c. 104, commonly called Lord Blandford's Act, was passed. By s. 9 thereof it is enacted that "the parish clerk and sexton of the church of any parish constituted under the recited acts (the church building acts) or this act, shall and may be appointed by the incumbent for the time being of such church, and be by him removable, with the consent of the bishop of the diocese, for any misconduct;" and by s. 10 it is enacted that "the freehold of the site of the church of any new parish created under this act or the said firstly and secondly recited acts (1), and of the churchyard, burial-ground, and vaults belonging thereto, with the rights, members, and appurtenances thereof; but, in case the same shall be vested in any vestry by any local act of parliament, then not without the consent of such vestry; and the house of residence, with the appurtenances thereof, and all the lands, tithes, tenements, hereditaments, and other endowments belonging to such church, or held by or vested in any person or body corporate in trust exclusively for or for the exclusive benefit of the incumbent of such church, shall become and be vested in such incumbent and his successors for ever, and be held and enjoyed by him and them in right of such incumbency; and all lands, tenements, or hereditaments granted or conveyed for the site of any church, and upon which any church shall be built, or for a burial-ground, shall from and after the consecration of such church and burial-ground respectively remain and be freed from and discharged of all the estate, right, title, interest, claim, and demand of any person, body politic or corporate whatsoever into or out of the same or any part thereof respectively; subject, nevertheless, to any rent that may be reserved thereout, and to the covenants and conditions subject to which the same may have been granted or conveyed."

21. By the 11th section it is enacted that, "from and after the

(1) 6 & 7 Vict. c. 37; 7 & 8 Vict. c. 94.

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commencement of the act, the commissioners may, if they shall think fit, upon application of the incumbent of any church or chapel to which a district shall belong, with the consent in writing of the bishop of the diocese, make an order under their common seal authorizing the publication of the banns of matrimony and the solemnization therein of marriages, baptisms, churchings, and burials, according to the laws and canons now in force in this realm: and all the fees payable for the performance of such offices, as well as all the mortuary and other ecclesiastical fees, dues, oblations, or offerings arising within the limits of such district shall be payable and be paid to the incumbent of such district."

22. By s. 12 it is enacted that, "in every case in which all or any part of the fees or other ecclesiastical dues arising within the limits of any district, or payable in respect of marriages, baptisms, churchings, and burials in the church or chapel thereof, or of such fees as are hereby made payable to the incumbent of any district, shall have been reserved, or, if such last-mentioned order had not been made, would of right belong, to the incumbent of the original parish, district, or place out of which the district of such church or chapel shall have been taken, or to the clerk thereof, an account of such fees shall be kept by the incumbent of such church or chapel, who is hereby required to receive, and every three months pay over the same to the incumbent and clerk respectively who would have been entitled to them in case such district had not been formed: and from and after the next avoidance of such incumbency, or the relinquishment of such fees by such incumbent, and after the situation of such clerk shall have become vacant, or after a compensation in lieu of fees has been awarded to such clerk by the bishop of the diocese (which he is thereby impowered to do), such reservation shall altogether cease and determine, and all such fees and dues shall belong to the incumbent of the district within which the same shall arise, or to the clerk of the church thereof."

23. By s. 14 it is enacted that, "whensoever or as soon as banns of matrimony, and the solemnization of marriages, christenings, and baptisms, according to the laws and canons in force in this realm, are authorized to be published and performed in any consecrated church or chapel to which a district shall belong, such district not being at the time of the passing of this act a separate and distinct

parish for ecclesiastical purposes, and the incumbent of which is by such authority entitled for his own benefit to the entire fees arising from the performance of such offices without any reservation thereout, such district or place shall become and be a separate and distinct parish for ecclesiastical purposes, such as is contemplated in the 15th section of the first-recited act (1), and the church or chapel of such district shall be the church of such parish, and all and singular the provisions of the said firstly and secondly recited acts (2), as amended by this act, relative to new parishes upon their becoming such, and to the matters and things consequent thereon, shall extend and apply to the said parish and church as fully and effectually as if the same had become a new parish under the provisions of the last-mentioned acts."

24. By s. 32 it is enacted that, "for the purposes of the acts concerning or regulating the burial of the dead, every parish created under the recited acts, or that act, should be held to be an ecclesiastical district within the meaning of the said acts."

25. Subsequently to the passing of the last act, viz. on the 24th of July, 1863, an order in council was duly made and published, by which a certain portion of the parish of St. Pancras was assigned to the parish chapel of St. Pancras, and constituted a district chapelry; and it was ordered that banns of matrimony should be published, and marriages, baptisms, churchings, and burials solemnized or performed in the said parish chapel of St. Pancras, and that the fees to be received in respect thereof should be paid and belong to the minister thereof for the time being. A copy of the material parts of the order in council was appended to and was to form part of the case.

26. After the passing of the Burial Act, 15 & 16 Vict. c. 85 (viz. in the year 1853), the aforesaid churchyard and new or additional burial-ground of the parish of St. Pancras were closed by order in council, and a new cemetery provided for the parish at Finchley; since which time no fees for burials have been received in respect of the said churchyard and new or additional burying-ground.

27. Since the opening the cemetery, all surplice-fees upon burials from all parts of the parish of St. Pancras have been and still are

(1) 6 & 7 Vict. c. 37. (2) 6 & 7 Vict. c. 37; 7 & 8 Vict. c. 94.

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received by the vicar of the parish of St. Pancras; but his right to receive the same is disputed by the defendant.

28. The 15 & 16 Vict. c. 85 provides (s. 36) that, where trustees receive the burial-fees of any parish for any parochial purpose, they shall still be so received; and the Burial Act of 18 & 19 Vict. c. 128 provides (s. 18) that closed grounds shall be kept in order at the expense of the poor-rate, except where a fund exists for the purpose. The trustees have down to the present time received the burial-fees for the parish at Finchley, and in their annual accounts returned under the 1 & 2 Geo. 4, c. xxiv, s. 62, have charged the expenses of keeping in order the aforesaid churchyard and new or additional burying-ground; and the poor-rate has not been resorted to for that purpose.

The question for the opinion of the Court was, whether the plaintiff was entitled to the freehold of the said churchyard.

Gray, Q.C. (*R. G. Williams* with him), for the plaintiff. Before the freehold of the old churchyard can vest in the defendant, the incumbent of the district chapel of St. Pancras, two conditions must be fulfilled,—first, the district must be a new parish created under Lord Blandford's Act (19 & 20 Vict. c. 104), or the acts therein recited (6 & 7 Vict. c. 37, and 7 & 8 Vict. c. 94),—secondly, it must be a burial-ground belonging to the district chapel within s. 10 of the first-mentioned act. Neither of these conditions is fulfilled here; for, the district chapelry is not created under the acts referred to, but under the local act of 56 Geo. 3, c. xxxix; nor can the churchyard be said in any sense to "belong to" the district chapel. Prior to the year 1792, the freehold of the churchyard was unquestionably vested in the vicar of the parish of St. Pancras. The churchyard being found to be too small for the exigencies of the parish, the 32 Geo. 3, c. lxvi, impowered certain trustees to purchase land, not exceeding two acres in extent, for an additional burial-ground, the legal estate in which was to be vested in the vicar and churchwardens for the time being. Then came the act of 56 Geo. 3, c. xxxix, under which the new church was built. By the provisions of that act, the old church of St. Pancras ceased to be the parish church, and became, like the new chapel thereby authorized to be built, called Camden Chapel, a parish chapel.

There was nothing in that act to take the fee-simple of the old burial-ground out of the vicar. In 1853, by an order in council, the old churchyard and the additional burial-ground were closed, and a new cemetery was provided for the parish at Finchley. Still there was nothing to affect the ownership of the fee-simple of the old churchyard. On the part of the defendant it will be contended that the fee is taken out of the vicar and vested in him by the operation of the 10th section of Lord Blandford's Act, 19 & 20 Vict. c. 104. That section enacts that "the freehold of the site of the church of any new parish created under that act, and of the churchyard, burial-ground, and vaults *belonging thereto*, and the house of residence, and all the lands, &c., belonging to such church, or held by or vested in any person or body corporate in trust exclusively for or for the exclusive benefit of the incumbent of such church, shall become and be vested in such incumbent and his successors for ever, and be held and enjoyed by him and them in right of such incumbency." This churchyard, it is submitted, never did "belong to" the district chapel in the sense here meant. If there had been no order in council, the old churchyard, the additional burial-ground, and the ground at Finchley, would have been the burial-ground of the parish, and the fee-simple of each would have remained as before: and there is nothing in Lord Blandford's Act to alter that state of things. Neither is there in the Burial Acts. This was in effect decided by V.C. Wood, in *Re the St. Pancras Burial Ground.* (1) When the old church became a chapel of ease, the old burial-ground, the churchyard, still remained the burial-ground of the parish: and it cannot be said to belong to the district chapel merely by reason of its contiguity thereto.

Mellish, Q.C. (*Beresford* with him), for the defendant. Originally, the building which has now become a district chapel, was the parish church of St. Pancras, and the churchyard attached thereto was the burial-ground of the parish. But the old churchyard, as well as the additional ground, ceased to be the place of burial for the parish from the making of the order in council in 1853. By the subsequent order in council of July, 1863, a district was assigned to the old church, which then became *the church* of that district. The question is, what is the construction of the 10th section of

(1) Law Rep. 3 Eq. 173.

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Lord Blandford's Act in that state of things? It will hardly be disputed that the freehold of the church of the new district was taken out of the vicar, and vested in the new incumbent. Were not the vaults under the church vested in the new incumbent? The more convenient and rational construction of the act is that the site of the church, and the vaults, and the ground surrounding the church, should all equally vest in the incumbent of the new parish. Church-yard, like court-yard, or stable-yard, or farm-yard, means no more than the yard which surrounds and belongs to the church: it is not necessarily a place of burial at all; it is the inclosure which protects the sacred edifice from pollution.

[WILLES, J. Anciently, the place for the burial of the dead was at a distance from the church: Burn's Ecclesiastical Law. (1)]

Lord Coke, in his commentary on the statute of Circumspecte agatis (13 Edw. 1, stat. 2), says (2): "The parishioners ought to repair the inclosure of the churchyard, because the bodies of the more common sort are buried there, and for the preservation of the burials of those that were, or should have been, whiles they lived the temples of the Holy Ghost: and cemeterium is derived of the Greek verb κοιμάω, that is, dormio; and therefore cemeterium est quasi dormitorium, quia mortui dormire dicuntur usque ad resurrectionem. And also, if the churchyard be not decently inclosed, the church, which is domus Dei, cannot decently be kept; and therefore this the parishioners ought to do, per consuetudinem notoriam et approbatam, and the conusans thereof is allowed by this act." The 32nd section of Lord Blandford's Act, which is set out in par. 24 of the case, illustrates that. The district church could not be a new parish church, unless marriages, christenings, and burials were performed therein, and fees taken for performance of those rites. By the 35 Edw. 1, stat. 2, which is intituled "Ne rector prosternat arbores in cemeterio," it is declared, in s. 1, that "forasmuch as a churchyard that is dedicated is the soil of a church, and whatsoever is planted belongeth to the soil, it must needs follow that those trees which be growing in the churchyard are to be reckoned amongst the goods of the church, the which laymen have no authority to dispose, but, as the Holy Scripture doth testify, the charge of them is committed to the priests to be dis-

(1) Title *Church*, V. (2) 2 Inst. 489.

posed of." And s. 2 goes on: "And yet, seeing those trees be often planted to defend the force of the wind from hurting of the church, we do prohibit the parsons of the church that they do not presume to fell them down unadvisedly, but when the chancel of the church does want necessary reparations: neither shall they be converted to any other use, except the body of the church doth need like repair; in which case the parsons of their charity shall do well to relieve the parishioners with bestowing upon them the same trees; which we will not command to be done, but will commend it when it is done." Erle, J., in *The Queen* v. *Abney* (1) says: "The 35 Edw. 1, stat. 2, speaks of a churchyard as *the soil of a church*. Therefore, where the statutes referred to in this argument (2) speak of 'existing churches,' those words may include churchyards as well as the building itself."

Gray, in reply, was stopped by the Court.

BOVILL, C.J. No question arises as to the additional burial-ground acquired under the local act of 32 Geo. 3, c. lxvi. (3) The only question is, in whom is vested the freehold of the old churchyard of St. Pancras,—whether in the incumbent of the new church which by the 56 Geo. 3, c. xxxix, became the parish church of St. Pancras, or in the incumbent of the old church, which by the same act was made a parish chapel. This question depends mainly upon the construction of the 10th section of Lord Blandford's Act, 19 & 20 Vict. c. 104. The churchyard in question was undoubtedly at one time the burial-ground of the whole parish, and vested in the incumbent of the parish church; and all the inhabitants of the parish had a right to bury their dead there. Afterwards came an order in council, by which both the old churchyard and the new or additional burial-ground were closed; and a cemetery was formed at Finchley, which is now the place of burial for St. Pancras. The language of the act of parliament making the new church the mother church of the parish is general in its character; and the freehold of the old churchyard being in the vicar of the parish, subject to the rights of the inhabitants of the parish, there

(1) 23 L. J. (M.C.) 154, 156.

(2) 58 Geo. 3, c. 45; and 59 Geo. 3, c. 134.

(3) That was admitted to be vested in the vicar and churchwardens for the benefit of the church trustees under the local act.

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is nothing to take it out of him and to make it part of the old church (now a district chapel), except the fact of its being contiguous thereto. There is no provision in the act to make it cease to be the parish churchyard, and become the churchyard of the new district. For these reasons, I am of opinion that the freehold remains in the plaintiff, the incumbent of the parish of St. Pancras, and consequently that he is entitled to our judgment.

WILLES, J. I am of the same opinion. The words "belonging to" cannot mean merely standing in any relation of position to the church of the parish, but must mean the property of, or devoted to the use of the church, or of those who worship there. It must be conceded that before the passing of Lord Blandford's Act (19 & 20 Vict. c. 104) the property in the old churchyard was in the incumbent of the parish. Then, as to its use,—though by reason of the order in council its use as a burial-place is interdicted, yet, in the event of the prohibition being removed, it would revert to the mother church of the parish. Neither, therefore, as to property or potential use is there any nexus between the chapel and the locus in quo in respect of which it can be said to belong to the chapel. The right of the incumbent of the parish church consequently must prevail.

KEATING, J., concurred.

MONTAGUE SMITH, J. I am of the same opinion. I agree with my Brother Willes that the words "belonging to" refer to something belonging in point of right or use to the church. Mr. Mellish's argument admits that that would have been the true construction if the yard or burial-ground in question had not been adjacent to the sacred building. But his contention was that the churchyard passed as part of the sacred inclosure to the incumbent of the parish chapel, by force of the 10th section of Lord Blandford's Act. That section no doubt vests in the incumbent of the new district the site of church and of the churchyard, burial-ground, and vaults "belonging thereto." But there is nothing to shew that this churchyard belonged to the old church in the sense necessary to make it pass to the incumbent of the new district

under that act. It was formerly the place of burial for the whole parish: and there are no facts stated in the case to shew that it can in any sense fall within the description of the site of the district or parish chapel. Nor can it be said that it was land "held by or vested in any person or body corporate in trust exclusively for or for the exclusive benefit of the incumbent of such church." I therefore think the plaintiff is entitled to judgment.

Judgment for the plaintiff.

Attorneys for plaintiff: *Scadding & Son.*
Attorneys for defendant: *Bird & Moore.*

EVANS *v.* WALTON.

June 11.

Enticing away and seducing a Servant—Contract of Service—Parent and Child.

An action will lie for enticing away the plaintiff's daughter, though there be no allegation that the defendant debauched her, or that there was any binding contract of service between her and the plaintiff.

The plaintiff's daughter, who was about nineteen years of age, resided with him as a member of his family, and assisted him in his business of a licensed victualler. By means of a fictitious letter of invitation dictated by the defendant, she procured her mother's consent to her quitting her home for a few days, when she left, and the defendant took her to a lodging-house, where he cohabited with her for nine days, and she then returned home:—

Held, that there was a sufficient continuing relation of master and servant de facto, and sufficient evidence of a wrongful enticing away of the daughter by the defendant, to entitle the plaintiff to maintain an action against him.

The first count of the declaration stated that Louisa Evans was and still is the servant of the plaintiff in his business of a publican and victualler; and that the defendant, well knowing the same, wrongfully enticed and procured the said Louisa Evans unlawfully and without the consent and against the will of the plaintiff, her said master, to depart from the service of the plaintiff; whereby the plaintiff had lost the service of the said Louisa Evans in his said business.

The second count alleged that Louisa Evans departed from the

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service of the plaintiff, and that the defendant, well knowing the premises, wrongfully and without the consent and against the will of the plaintiff, received and harboured and detained her, and refused to deliver her to the plaintiff, although requested by the plaintiff so to do; whereby the plaintiff lost her service in his said business.

Pleas, not guilty, and that Louisa Evans was not the servant of the plaintiff, as alleged. Issue thereon.

The cause was tried before Pigott, B., at the last spring assizes at Oxford. The plaintiff was a licensed victualler in Birmingham, and was assisted in his business by his daughter Louisa, a girl about nineteen years of age, who served in the bar and kept the accounts. On the 10th of November, 1866, the daughter, with her mother's permission, which was procured by means of a fabricated letter purporting to be an invitation to her to spend a few days with a friend at Manchester, left the plaintiff's house and went to a lodging-house in the neighbourhood of Birmingham, where she cohabited with the defendant, at whose dictation the above-mentioned letter had been written. On the 19th of November the daughter returned home, and resumed her duties for a short time, but ultimately left her home again, and on the 9th of February was again found cohabiting with the defendant at the same lodging house.

On the part of the defendant it was submitted that, in order to sustain the action, in the absence of an allegation that the defendant had debauched the plaintiff's daughter, it was necessary to shew a binding contract of service.

The learned Baron, after consulting Blackburn, J., intimated an opinion that the action would lie upon the declaration as framed; but he reserved to the defendant leave to move to enter a nonsuit if the Court should be of opinion that in point of law the action was not maintainable,—the Court to have power to draw any inferences of fact, and to amend the declaration, if necessary, according to the facts proved.

The case was then left to the jury, who returned a verdict for the plaintiff, damages 50*l*.

Huddleston, Q.C., in Easter Term obtained a rule nisi.

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Powell, Q.C., and *J. O. Griffits* (June 11), shewed cause, submitting that the action would lie upon the declaration as it stood.

The Court called on

H. James, and *Jelf*, in support of the rule. There are two kinds of action for loss of service, viz. an action for the seduction and consequent loss of service of a daughter, and an action for enticing away a servant. In order to sustain the first, it is not enough that there has been criminal intercourse, but it must be shewn that that intercourse has resulted in pregnancy or other illness, so as to cause a disability in the daughter to perform her accustomed duties: *Eager* v. *Grimwood* (1); *Boyle* v. *Brandon* (2); but an actual contract of service need not be proved. It is not suggested that there is any such cause of action here. In Sedgwick on Damages (3), it is said that, "although the defendant be guilty of the seduction, but the jury are of opinion that the child is not his, the plaintiff cannot recover. In other words, without some damage to the plaintiff or master, occasioned by the illness of the female, and resulting from the illicit intercourse, the plaintiff is without relief." And for this *Eager* v. *Grimwood* (1) is cited.

[BOVILL, C.J. *Eager* v. *Grimwood* (1) is cited in Smith's Leading Cases (4) with evident disapprobation.]

No precedent is to be found without the allegation per quod servitium amisit. The action for seduction is an anomalous one.

[WILLES, J. Upon the first point, I think we are bound by the case of *Eager* v. *Grimwood*. (1) The question is whether the action may not be maintained for enticing the girl away from her father's service.]

To sustain an action for enticing away a servant, it is necessary to shew a valid and binding contract of service, which has been broken through the procurement of the defendant. Actual service is not enough. Here, there was no contract, express or implied, for the breach of which the father could have sued his daughter. All that the defendant can be charged with having done is, inciting the daughter to do that which in the exercise of her own free will she had an undoubted right to do. If an action

(1) 1 Exch. 61.
(2) 13 M. & W. 738.
(3) 2nd ed. p. 543.
(4) 6th ed. vol. i. p. 260.

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would lie for this, it would equally lie for inducing a daughter to quit her father's house for the purpose of marrying her. (1) In *Cox* v. *Muncey* (2) it was held by this Court that no action will lie for enticing away an apprentice, unless there be a valid contract of apprenticeship; and the like was held as to a servant by the Court of Queen's Bench in *Sykes* v. *Dixon*. (3)

[BOVILL, C.J. At the end of Lord Denman's judgment in *Sykes* v. *Dixon* (3), there is a remark which seems to be adverse to your view. "Then," says his Lordship, "it was argued, on the authority of *Keane* v. *Boycott* (4), that the objection" (that is, to the validity of the contract,) "was not one which a third person could take: and that might be so in a case where the servant was de facto continuing in the service; but not here, where he had quitted his master, and taken his chance in hiring himself to the defendant." Here the daughter was de facto continuing in the service of her father when the defendant seduced her therefrom.]

All the authorities were referred to in *Lumley* v. *Gye* (5), and amongst them *Blake* v. *Lanyon* (6); but in none of them was the action held to lie in the absence of a binding contract of service.

[BOVILL, C.J. In *Jones* v. *Brown* (7) it was ruled by Lord Kenyon that to maintain an action for assaulting the plaintiff's infant son, per quod servitium amisit, proof of his living under his father's roof is sufficient evidence of service. Is there any case where it has been distinctly laid down that there must be something beyond the ordinary contract of service which the law will imply in the case of a son or a daughter?]

Where the action is simply for enticing away from the service, the relation of parent and child is not to be taken into consideration. All the text-books lay it down generally that there must in such a case be a binding contract: see 3 Bl. Com. 142; Smith's Master and Servant, 2nd ed. 100; Addison on Torts, 2nd ed. 802. A technical objection to the contract has been held to be fatal on various occasions.

(1) See Fitz. N. B. 90 H.
(2) 6 C. B. (N.S.) 375.
(3) 9 Ad. & E. 693; 1 P. & D. 463.
(4) 2 H. Bl. 511.
(5) 2 E. & B. 216; 22 L. J. (Q.B.) 463.
(6) 6 T. R. 221.
(7) Peake, 233 (3rd ed. 306).

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BOVILL, C.J. The rule in this case was granted principally on the contention of the defendant's counsel that, in order to sustain the action, it was necessary to shew that there was a binding contract of service between the father and the daughter. And for this proposition various text-books were referred to, and several cases cited, amongst which was that of *Sykes* v. *Dixon*. (1) But, when that case is looked at, I find no such principle involved in the decision. Indeed, in each of the cases, from the form of the declaration, it became necessary to prove some contract for service beyond that which the law would imply from the relation of the parties. No authority is to be found where it has been held that in an action for enticing away the plaintiff's daughter a binding contract of service must be alleged and proved. But there are abundant authorities to shew the contrary. It is said that the case of seduction is anomalous in this respect. There is, however, no foundation for that assertion. In the case of an action for the seduction of a daughter, no proof of service is necessary beyond the services implied from the daughter's living in her father's house as a member of his family. So, in the case of an action for assaulting the plaintiff's infant son or daughter, no evidence of service is necessary beyond that which the law will imply as between parent and child. In *Barber* v. *Dennis* (2) the widow of a waterman, who, as was said, by the usage of Waterman's Hall may take an apprentice, had her apprentice taken from her and put on board a Queen's ship, where he earned two tickets, which came to the defendant's hands, and for which the mistress brought trover. It was agreed that the action would well lie if the apprentice were a legal apprentice, for his possession would be that of his master, and whatever he earns shall go to his master; but it was objected that the company of watermen is a voluntary society, and that being free of it does not make a man free of London, so that the custom of London for persons under one and twenty to bind themselves apprentices does not extend to watermen; which was agreed by all. Then it was said that the supposed apprentice here was no legal apprentice if the indentures be not enrolled pursuant to the 5 Eliz. c. 4, and, if he were not a legal apprentice, the plaintiff had no title. But

(1) 9 Ad. & E. 693; 1 P. & D. 463.
(2) 6 Mod. 69; 1 Salk. 68.

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Holt, C.J., said he would understand him an apprentice or servant de facto, and that would suffice against them, being wrongdoers. Again, in Fitz. N.B. 91 G., it is laid down that, "if a man ought to have toll in a fair &c., and his servants are disturbed in gathering the same, he shall have trespass for assault of his servants, and for the loss of their service," &c. To this is appended a note by Lord Hale: "Trespass for beating his servants per quod servitium amisit, lies, although he was not retained, but served only at will: 11 H. 4, fo. 2, per Hull, accordant. And so, if A. retains B. to be his servant, who departs into another county, and serves C., A. before any request or seizure cannot beat B.; and, if he does, C. shall have trespass against him (21 H. 6, fo. 9), and recover damages, having regard to the loss of service (22 Ass. 76); and the retainer is traversable: 11 H. 6, fo. 30." These authorities, and the principle upon which the action for assaulting a servant is founded, would seem to shew that an actual binding contract is not necessary. There is no allegation in this declaration of a hiring for any definite time. All that is alleged is, that the girl was the daughter and servant of the plaintiff. It cannot be doubted that the jury would infer from the facts that the relation of master and servant did exist, without any evidence of a contract for a definite time; and, if we are to draw inferences from the facts, I should come to the same conclusion. Then, was that relation put an end to? The service, no doubt, was one which would be determinable at the will of either party, as is said by Bramwell, B., in *Thompson* v. *Ross*. (1) That this kind of service is sufficient, I should gather from the language used by this Court in *Hartley* v. *Cummings* (2), and particularly from the judgment of Maule, J. That was an action for seducing workmen from the service of the plaintiff, a glass and alkali manufacturer, and harbouring them after notice. It appeared that one Pike was in the service of the plaintiff, and the defendant induced him to leave. In giving judgment, Maule, J., says: "The objection urged on the part of the defendant is, that the agreement entered into by Pike with the plaintiff was one that gave the latter no right to compel Pike to serve him, inasmuch as it was void either for want of mutuality or because it was a contract to an unreasonable extent operating in restraint of trade. On the other

(1) 5 H. & N. 16, 18; 29 L. J. (Ex.) 1. (2) 5 C. B. 247.

5 Jur. N.S. 1135.

side, it was insisted, upon the authority of *Keane* v. *Boycott* (1), that it is quite immaterial, for the purposes of this action, whether the agreement was void or not; for, that it is not competent to the defendants, who are wrongdoers, to take advantage of its invalidity. In answer to this, the case of *Sykes* v. *Dixon* (2) was cited on the part of the defendants, where it is said to have been decided by the Court of Queen's Bench that such an objection may be set up by a third person not a party to the agreement. It is unnecessary to say whether that case may not be distinguished from the present,—there being no subsisting service that was interrupted by the act of the defendant,—because I am of opinion that in this case there was a contract between Hartley and Pike which was perfectly valid, notwithstanding the objections that have been urged." Whether or not there was a subsisting service seems to be the test. I think the jury properly assumed that there was a subsisting service here. It is said that the girl's services were not lost to the plaintiff by reason of the defendant's having enticed her away; for that, inasmuch as she afterwards returned to her father's house, the relation of master and servant was not put an end to by any act of the defendant's. I think, however, there was a sufficient interruption of the service to entitle the plaintiff to maintain the action, and that the rule to enter a nonsuit should be discharged.

WILLES, J. I am of the same opinion. I cannot look at it as an anomaly to hold that the daughter was the servant of her father at the time the defendant by his enticement induced her to forbear from rendering to her father the services which were due to him from her. There is a series of cases in the books, of which that in the Year Book of 11 H. 4, fo. 2, is probably the first, to shew that this action is maintainable. That case was followed by a very remarkable one of M. 22 H. 6, fo. 30, in which that doctrine is fully recognised, and where service at will and service upon a retainer are put upon the same footing with regard to any complaint of being wrongfully deprived of their fruits, and it is pointed out that the writ at common law ran, "quare un tiel servientem meum in servitio meo existentem cepit et abduxit," without alleging any contract or retainer. That runs so completely with

(1) 2 H. Bl. 511. (2) 9 Ad. & E. 693; 1 P. & D. 463.

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the earlier case, and also with the doctrine of Lord Denman in *Sykes* v. *Dixon* (1), and of Maule, J., in *Hartley* v. *Cummings* (2), and also with the observations of Bramwell, B., in *Thompson* v. *Ross* (3), that I feel no difficulty in holding that, upon authority, as well as in good sense, the father of a family, in respect of such service as his daughter renders him from her sense of duty and filial gratitude, stands in the same position as an ordinary master. If she is in his service, whether de son bon gre or sur retainer, he is equally entitled to her services, and to maintain an action against one who entices her away. Assuming that the service was at the will of both parties, like a tenancy at will, the relation must be put an end to in some way before the rights of the master under it can be lost. As a question of fact, was the daughter in the service of her father at the time the cause of action arose? Was the relation of master and servant put an end to by her quitting her father's house by means of the false pretence to which the defendant induced her to resort? There was no proof that she quitted without any intention to return to her home. What pretence, then, was there for assuming that the service at will was put an end to? To use the language of Newton, J., in the case in 22 H. 6, fo. 30, it is no more than if a servant should absent herself for the purpose of going to church on the Sabbath day. Then, was the defendant guilty of any wrong in keeping her away from the plaintiff's service? I apprehend that, where the relation of master and servant exists, any fraud whereby the servant is induced to absent herself affords a ground of action. Somewhat the same sort of question arose in *Winsmore* v. *Greenbank* (4), where, in an action on the case for inducing the plaintiff's wife to continue absent, it was held to be sufficient to state that "the defendant unlawfully and unjustly persuaded, procured, and enticed the wife to continue absent, &c., by means of which persuasion, &c., she did continue absent, &c., whereby the plaintiff lost the comfort and society of his wife, &c.," without setting forth the means used by the defendant, or alleging that any adultery had been committed. There is really no difficulty when once the relation of master and servant at the time of the acts complained

(1) 9 Ad. & E. 693, 699; 1 P. & D. 463.
(2) 5 C. B. 247.
(3) 5 H. & N. at p. 18.
(4) Willes, 577.

of is established. It was said that inasmuch as none of the usual consequences, such as sickness or the birth of a child, resulted from the defendant's acts, no action is maintainable for the mere improper intercourse. Be it so, as there is an authority in favour of that position (1); but that only removes the charge of debauching the plaintiff's daughter out of the way. It does seem to me to be an extraordinary thing, and to reduce the argument to an absurdity, to say that the plaintiff would have had a sufficient cause of action against the defendant if the daughter had proved with child by him and had gone back to her father's house and been confined there, and that the fact of the father having through his fraud been deprived of his daughter's services during the nine days' concubinage affords no ground of action. The conclusion I arrive at is, that it was a question for the jury whether at the time the daughter left her father's house there was an existing service de facto, and whether by the defendant's means and procurement that service was denied to the plaintiff. If both those questions were found against the defendant, the plaintiff was clearly entitled to the verdict. I think there was abundant evidence to support the finding, and that the rule must be discharged.

MONTAGUE SMITH, J. I am of the same opinion. I think the evidence sustains the declaration in its present form. It was contended that, although the relation of parent and child does create the relation of master and servant in the ordinary case of an action for seduction, no such relation is created in a case of this sort. The contrary, however, is to be collected from *Jones* v. *Brown* (2) and *Hall* v. *Hollander*. (3) Then it is said that, to maintain the action for enticing away the plaintiff's servant, the right to a child's services which the law implies where she is a member of the father's family, will not suffice, but that there must be proof of some binding contract of service. It appears to me, however, that there is abundant authority for holding that there was an existing relation of master and servant here, by interfering with which the defendant was guilty of an actionable wrong. But for the defendant, the service would have remained uninterrupted. It

(1) *Eager* v. *Grimwood*, 1 Ex. 61. (2) Peake, 233, 3rd ed. 306.
(3) 4 B. & C. 660.

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does not appear that the girl had any intention of quitting her father's roof, until induced by the defendant to do so. It may be that no action will lie against a man for inducing another's servant to come into his service at the expiration of the existing service. At first I was inclined to think that, as the service was determinable at the will of the daughter, when she willingly quitted her father's house the service was at an end. But the facts shew that she was incited by the defendant to leave her home, and was taken out of a continuing service. Such an action was held to be maintainable in a case of *Speight* v. *Oliveira* (1), the facts of which are like those here, except that there the girl was seduced after she had left her father's house and service, and entered into the service of the defendant. Lord Tenterden, in summing up, said: "During the time that she was in her father's house, she was in his service. Was there an end put to that service? It is alleged by the defendant that there was, because he himself hired her for the purpose of keeping his own house, at the rate of 7*s.* per week. But, if he did not in reality hire her with that intention, but with the wicked view of seducing her, then I am of opinion that the relation of master and servant was never contracted between them." It seems to me that the facts proved here shew that the girl did not intend to leave her father's service until she was induced to do so by the defendant. Under these circumstances, I think the action is maintainable without any amendment.

My Brother Keating, who has been obliged to go away, desired me to say that he entirely concurs in this judgment.

Rule discharged.

Attorneys for plaintiff: *Fearon, Clabon, & Fearon, for Hawkes, Birmingham.*

Attorneys for defendant: *Bird & Moore.*

(1) 2 Stark. 493.

BAGUELEY AND ANOTHER *v.* HAWLEY.

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July 8.

Sale of Goods—Warranty of Title—Undertaking to Deliver, or that the Buyer should be permitted to carry away the Thing sold—Evidence.

A boiler set in brickwork, and capable, if taken to pieces, of being removed without injury to the premises, had been seized and sold under a distress for a poor-rate due from the occupier, and bought at a public auction by the defendant, and resold by him to the plaintiffs at an advanced price, with notice of the circumstances under which the defendant had bought it, the plaintiffs to remove it at their own expense. The mortgagees of the premises upon which the boiler stood having prevented the plaintiffs from carrying it away, the plaintiffs brought an action against the defendant, relying upon an alleged implied warranty that he had good title to the boiler, and that they should be permitted to remove it:—

Held, by Bovill, C.J., and Montague Smith, J. (dissentiente, Willes, J.), that there was no evidence to justify the jury in finding a warranty as alleged.

THE declaration contained counts in trover and detinue for a boiler, and a special count for not delivering the boiler according to contract, and also a count for money had and received.

Pleas, amongst others, not guilty, not possessed, and never indebted.

The cause was tried before Blackburn, J., at the last winter assize at Manchester. The facts were as follows:—The tenants of a colliery in Staffordshire having omitted to pay a poor-rate, a distress was made, under which the boiler in question, amongst other things, had been seized. The boiler was set in brickwork in the usual way, and was capable of being removed without injury to the premises; but it was too large to be taken away whole without taking down part of the outer wall of the boiler-house. The goods distrained were sold by public auction. The boiler was purchased at the sale by the defendant, and he afterwards agreed to sell it to the plaintiffs at an advanced price as it stood. The plaintiffs were informed when they purchased the boiler that it had been sold under a distress for poor-rate, went to the premises to look at it, and were introduced by the defendant to the auctioneer (Butler). The price having been paid, the plaintiffs asked what time would be allowed for taking it away. The defendant answered, seven days; but Butler, the auctioneer, observed that, as the money was paid, he did not see that a few days more would make much dif-

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ference; and ultimately it was arranged that the plaintiffs should have fourteen days for the removal. When the plaintiffs went to the premises for the purpose of taking away the boiler, they found it at work; and some persons who claimed to be mortgagees of the colliery refused to allow it to be removed, objecting that it had been illegally distrained; and their attorney afterwards wrote to the plaintiffs threatening an action if they attempted to take it. The plaintiffs thereupon brought this action.

On the part of the defendant it was contended, upon the authority of *Morley* v. *Attenborough* (1), that there was no warranty that he had a good title to the boiler, and that the plaintiffs should be permitted to remove it; but that he merely contracted to sell to the plaintiffs such title as he himself had. For the plaintiffs, on the other hand, it was insisted, mainly upon the authority of *Eicholz* v. *Bannister* (2), that a warranty of title, and that the plaintiffs should be allowed to remove the boiler, was to be inferred from the circumstances under which the sale took place.

The learned judge, assuming that the boiler had been properly distrained, left it to the jury to say whether there was any warranty or engagement on the part of the defendant that he had a good title to the thing which he sold, and that the buyers should be permitted to take it away.

The jury found that the sale was absolute and unconditional, and that there was an understanding that the plaintiffs were to have effectual possession of the boiler; and they returned a verdict for the plaintiffs. Leave was reserved to the defendant to move to enter a verdict for him or a nonsuit.

Holker, in Hilary Term last, obtained a rule nisi accordingly, on the ground that there was no evidence from which the jury could reasonably infer a warranty such as was relied on by the plaintiffs.

Temple, Q.C., and *Crompton* (Feb. 4), shewed cause. The question was properly left to the jury, and their verdict was warranted by the evidence. If the defendant sold the boiler with an engagement to deliver, or that the buyers should be permitted to take peaceable possession of it, whether they were prevented from doing

(1) 3 Ex. 500. (2) 17 C. B. (N.S.) 708; 34 L. J. (C.P.) 105.

so by persons having a right to obstruct them or not will not affect the question. There was abundant evidence of an implied undertaking by the defendant that the boiler should be at the plaintiffs' disposal at any time within the fourteen days. It is no answer to say that the plaintiffs were informed of the circumstances under which it had been seized and sold. They were justified in assuming that the seizure and sale were lawful. The whole transaction shews such an assertion of dominion on the part of the defendant as to warrant the conclusion at which the jury arrived.

Holker, in support of the rule. The plaintiffs, when they bought the boiler, were informed of the circumstances under which it came to the defendant. There was therefore no warranty of title either express or implied; and the case falls within the principle of *Chapman* v. *Spiller* (1) and *Morley* v. *Attenborough*. (2) A distress for a poor-rate is analogous to a seizure under a fi. fa.: *Hutchins* v. *Chambers* (3); per Bayley, J., in *Place* v. *Fagg*. (4) The property in the boiler, therefore, clearly passed under the sale by Butler, and the plaintiffs, in whom it vested by the sale by the defendant, were the only persons who could have maintained trover or detinue for it. It must not be forgotten that one of the terms of the bargain was, that the plaintiffs were to carry away the boiler at their own expense. Is the defendant to be held responsible for the wrongful act of a stranger?

Cur. adv. vult.

BOVILL, C.J. This was an action brought to recover back the price of a boiler paid by the plaintiffs to the defendant. The boiler was bedded in brickwork, and was so large that it could not be got out of the building whole without taking down part of the wall and injuring the building; but it could be removed by taking it to pieces.

The boiler had been seized and sold under a distress for poor-rate, and upon the facts we must take it that the defendant purchased it at the sale, and afterwards sold it to the plaintiffs at an advanced price. The plaintiffs at the time of the purchase were informed that the boiler had been bought at the sale and that one

(1) 14 Q. B. 621.
(2) 3 Ex. 500.
(3) 1 Burr. 579.
(4) 4 M. & R. 277.

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Butler was the auctioneer; and they went over to see the boiler. The plaintiffs asked the defendant what time was allowed to take it away, and he replied, about seven days. The defendant and Butler (the auctioneer) having consulted, they gave the plaintiffs fourteen days to remove the boiler; the auctioneer saying that, as long as it was paid for, he could not see that it made much difference. The money was paid by the plaintiffs to the defendant; a receipt was given by the defendant for the price; and the plaintiffs had been prevented removing the boiler.

Under these circumstances, the question arises, whether there was any evidence which ought to have been left to the jury, that there was a warranty or engagement by the defendant that he had a good title to the boiler, and that it should be delivered to the plaintiffs, or, rather, that they should be permitted to remove it: and this question was reserved at the trial. The defendant contended, mainly upon the authority of *Morley* v. *Attenborough* (1), that there was no such warranty or engagement on his part; whilst the plaintiffs contended that there were circumstances from which such a contract by the defendant might be inferred, and they relied principally upon the case of *Eicholz* v. *Bannister*. (2) Both parties were aware that the boiler had been sold under a distress for poor-rates, and both went to see it, with a view to its removal.

I consider the general rule to be, that, upon the sale of goods, there is no warranty of title implied by law; and I do not find any evidence or proof of any circumstances to take this case out of the ordinary rule, or upon which a jury could properly find that the defendant entered into any warranty of title, or any contract that the boiler should be delivered or allowed to be removed. In my opinion, therefore, the defendant is entitled to our judgment; and I think the rule to enter a nonsuit should be made absolute.

WILLES, J. We took time to consider in this case whether upon the facts disclosed in the report of the learned judge who tried the cause there was any warranty or engagement on the part of the defendant that he had a good title to the thing which he sold, and that the buyers should be permitted to take it away. The jury found that there was such a warranty; and the learned

(1) 3 Ex. 500. (2) 17 C. B. (N.S.) 708; 34 L. J. (C.P.) 105.

judge has expressed no dissatisfaction with their finding. I think there were circumstances from which the jury might have inferred a contract on the defendant's part to give the plaintiffs effectual possession of the boiler. They found that there was such a warranty as the plaintiffs contended for, and that the thing which the defendant sold was a boiler, and not a lawsuit. I cannot but doubt the correctness of the conclusion I have arrived at, because it differs from that to which the rest of the Court have come. But I am bound to express the opinion which I have formed. I think the rule ought to be discharged.

MONTAGUE SMITH, J. There was in this case,—the facts of which have been fully stated by my Lord,—an immediate resale of the boiler by the defendant to the plaintiffs before it had been removed, and with a full communication of the circumstances under which it had been just before purchased by the defendant at the auction. I think the intention of the parties to the contract was, that the plaintiffs should have such title only to the boiler, and such right only to take possession of it, as the defendant had himself bought; and that there is no evidence upon which the jury could properly find either a warranty of title or an undertaking to give possession. The case is not unlike, in substance, that of *Chapman* v. *Spiller*. (1)

The rule to enter the verdict for the defendant (or a nonsuit) ought therefore, in my opinion, to be made absolute.

Rule absolute for a nonsuit.

Attorney for plaintiffs: *E. K. Randell, for Cobbett & Wheeler, Manchester.*

Attorneys for defendant: *Rickards & Walker, for Blakiston & Everett, Hanley.*

(1) 14 Q. B. 621.

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June 5.

ALLEN *v.* THE DUKE OF HAMILTON.

Witness—Subpœna out of the Jurisdiction, under 17 & 18 *Vict. c.* 34.

12 QBD 41

A rule for a subpœna to bring up a witness from Scotland, under the 17 & 18 Vict. c. 34, will not be granted unless the affidavit disclose facts to shew that the attendance of the proposed witness is reasonably necessary.

Gilmore Evans moved, on behalf of the defendant, for leave to issue a subpœna, pursuant to the 17 & 18 Vict. c. 34, for the purpose of procuring the attendance of a witness residing in Scotland.

[WILLES, J. Does the affidavit shew what the witness is to prove? If he is merely to prove the handwriting of a party, or other like matter which may be proved by a witness residing within the jurisdiction, the rule ought not to go.]

The affidavit does not distinctly shew what the witness is expected to prove; but it is sworn that the application is made under the advice of counsel.

BOVILL, C.J. The Court must be satisfied that there is some reasonable ground for bringing a witness up from Scotland before they will exercise the discretion given to them by the statute. Let the affidavit be amended in this respect, and the motion be renewed.

Rule refused.

Attorneys for defendant: *Gregory, Rowcliffes, & Rawle.*

June 14.

SMITH *v.* THE LONDON AND ST. KATHARINE'S DOCK COMPANY.

Practice—Special Jury.

A judge at Chambers having refused to grant a special jury at the instance of the defendants, though there had been no laches on their part,—the Court, in the absence of special grounds for so doing, declined to interfere with his discretion.

THIS was an action to recover damages for an injury sustained by the plaintiff through the negligence of the defendants' servants. The declaration was delivered on the 28th of May, the pleas on the 10th of June, and issue was joined on the 11th. On the 12th

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the ordinary rule for a special jury was signed on behalf of the defendants: but, inasmuch as the notice of trial did not leave the six days required by the practice of the Court, it was necessary to obtain a judge's order. Application was thereupon made to Keating, J., at Chambers, but he dismissed the summons.

J. P. Murphy moved for a rule that the cause might be tried by a special jury. The only ground suggested for the application was that the invariable practice of the defendants was to have a special jury in every case in which they were interested.

BOVILL, C.J. My Brother Keating having heard the matter and exercised his discretion upon it, I do not think we ought to interfere. The delay occasioned by a special jury being summoned would materially prejudice the plaintiff, who probably has all his witnesses now ready.

MONTAGUE SMITH, J., concurred.

Rule refused.

SKELTON *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY.

June 8.

Railway—Contributory Negligence—Self-imposed Duty.

A railway, consisting of several lines, crossed a public footpath on a level at a point near a station, but the footpath was not in other respects dangerous. On each side of the railway was a good and sufficient swing gate, as required by the 8 & 9 Vict. c. 20, s. 61. The railway company, by way of extra precaution, usually, but not invariably, fastened the gates when a train was approaching. S., wishing to cross the railway, found the gate unfastened, and a coal train standing immediately in front of it. He waited until the coal train had moved off, and then, without looking up or down the line, commenced crossing the railway, and was killed by a passing train. If he had looked up the line he would have seen the train coming in time to stop and avoid the accident. In an action against the company by S.'s administratrix under Lord Campbell's Act:—

Held, that S. contributed to the accident by his negligence, and that the company, therefore, were not liable.

Held (by Willes, J.), that the mere failure to perform a self-imposed duty is not actionable negligence; that the omission to fasten the gate did not amount to an invitation to S. to come on the line; and that, therefore, even if S. was not guilty of contributory negligence, the company were not liable.

DECLARATION, that the defendants were possessed of a certain line of railway which crossed a public footway on a level, and of certain

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gates across the footway on each side of the railway, which gates the defendants usually kept closed and fastened when trains on the railway were approaching. Yet the defendants so negligently managed the railway and gates, and so negligently allowed the gates to be unfastened when a train was approaching and passing the footway, and so negligently managed a train on the railway, that William Skelton, whilst lawfully on the footway, was run over and injured, and by reason of his wounds he afterwards, and within twelve calendar months before the commencement of the action, died. Conclusion for damages for the benefit of the plaintiff as his wife and administratrix, and of his children.

Plea, not guilty.

The case was tried before Blackburn, J., at the Gloucester Spring Assizes, when the following facts were proved:—

The defendants' line crossed on a level near the Walsall Station, at a point where there are several lines of rails, a public footway, and the defendants had placed swing gates on each side of the railway across the footpath, in compliance with the 8 & 9 Vict. c. 20, s. 61. Each of these gates could be fastened by a ring attached to the gate post, and it was the duty of a signal man, who was stationed near, to let down the ring by means of a lever, and so fasten the gate whenever a train was approaching. It was proved that the gate was usually thus fastened when there was danger from the trains, but there was no proof that it was invariably so. Near the gate there was a notice, "Beware of the Trains." On the morning of the accident in question William Skelton was passing along the footway; he found the gate not fastened, but whether through the neglect of the signal man, or from the ring failing to catch the gate, was not shewn. There was a coal train, however, immediately in front of the gate, and Skelton waited till that had moved off, and then crossed the rails without looking up or down the line. From the gate it was only possible to see about twenty yards along the railway, but on reaching the first line of rails the view was clear for three hundred yards. Skelton was called to, but, being deaf, took no notice, and he was run over and killed by a train passing on one of the further lines of rails. If he had looked up the line on going on the railway he would have seen the train in time to have stopped before the accident occurred.

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The learned Judge directed a nonsuit, but he asked the jury whether the conduct of the defendants in usually fastening the gate but failing to do so on this occasion, amounted to a snare, and had so occasioned the injury to the deceased, and whether the deceased had contributed to the accident by his negligence. The jury found a verdict for the plaintiff, damages 500*l*. The judge thereupon gave leave to the plaintiff to move to set aside the nonsuit and enter a verdict for the plaintiff for that amount.

Huddleston, Q.C., having obtained a rule pursuant to the leave reserved,

J. J. Powell, Q.C., and *A. S. Hill*, shewed cause. The only duty cast upon the defendants by statute in relation to *footways* is to keep good and sufficient gates on each side of the railway (8 & 9 Vict. c. 20, s. 61), and this, it is admitted, was done; but it is contended that, as they had for two years kept the gates fastened when trains were approaching, it had become incumbent on them to do so. There is no evidence, however, that the gate was always fastened, and if there had been, a voluntary practice of the defendants' would not have given the public any fresh rights. The case of *Bilbee* v. *London, Brighton, and South Coast Railway Company* (1) decided, that where the crossing is specially dangerous the company are bound to take other precautions than those imposed by statute; but in this case the crossing was of the usual character. In *Stapley* v. *London, Brighton, and South Coast Railway Company* (2) there was a carriage-way as well as a footway, and the company had neglected to comply with the statutes. The case of *Stubley* v. *London and North Western Railway Company* (3), which was argued while the Court was considering that case, and in which *Bilbee* v. *London, Brighton, and South Coast Railway Company* (1) was cited, is precisely in point, and is decisive in the defendants' favour. The company having complied with the statutable requirements, their position in relation to the public is the same as that of a person driving in an ordinary street: he and the public are equally bound to use reasonable care. Their

(1) 18 C. B. (N.S.) 584; 34 L. J. (C.P.) 182. (2) Law Rep. 1 Ex. 21. 11 Jur. (N.S.) 954
11 Jur. (N.S.) 745 (3) Law Rep. 1 Ex. 13. 11 Jur. (N.S.) 954.

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relative duties are well stated in *Cotton* v. *Wood* (1), which also shews, that if the facts are equally consistent with the supposition that the defendants were negligent or that they were not, the case should not be left to the jury. Here the deceased was guilty of contributory negligence, and the verdict of the jury, even if it ought to have been left to them, was against the weight of evidence. The deceased appears to have taken no care whatever, though his deafness should have made him doubly cautious.

Huddleston, Q.C., and *Jelf*, in support of the rule. The crossing was evidently a place of considerable danger; it was near a station and there were several lines of rails, and the very precautions that the defendants took are in themselves a proof that they considered it so. The defendants therefore were bound to take extra precautions, as was held in *Bilbee* v. *London, Brighton, and South Coast Railway Company* (2), and *James* v. *Great Western Railway Company*. (3) But, moreover, if a person takes upon himself a voluntary duty, he is bound to perform it with due care, and is liable for negligence, whether in the nature of a nonfeasance or

(1) 8 C. B. (N.S.) 568; 29 L. J. (C.P.) 333.

(2) 18 C. B. (N.S.) 584; 34 L. J. (C.P.) 182.

(3) *James* v. *Great Western Railway Company.*

This was an action to recover compensation for injuries sustained by the plaintiff, who was knocked down by an engine of the defendants while crossing their line at a level crossing. The case was tried before Pigott, B., at the Glamorganshire Summer Assizes, 1866. It appeared from the evidence, that it was a dark, foggy morning at the time of the accident, and the railway was also obscured by the smoke from neighbouring spelter works. The plaintiff exercised due caution by looking up and down the line, but did not see the engine for the above reasons. According to the plaintiff's evidence, the engine had no light, and the engine-driver did not whistle or give any notice of his approach. The jury found a verdict for the plaintiff for 200*l.*

Giffard, Q.C., having obtained a rule nisi to set aside the verdict, and enter a nonsuit, on the ground that there was no evidence to go to the jury of negligence on the part of the defendants,

Garth, Q.C., and *Hughes*, shewed cause.

Giffard, Q.C., and *Bowen*, supported the rule.

The Court (Bovill, C.J., Willes, and Montague Smith, JJ.) discharged the rule, on the ground that the defendants were bound to use reasonable precautions in the working of their line, and that, considering the darkness, it would have been a reasonable precaution to whistle before coming to the crossing; and that there was therefore some evidence to go to the jury of negligence on the part of the defendants.

a misfeasance. The fact of the gate being unfastened amounted to an invitation to the deceased to come on the line, exactly as the open gate and the absence of the gate-keeper did in *Stapley* v. *London, Brighton, and South Coast Railway Company* (1).

[MONTAGUE SMITH, J. There the company had not complied with the statutes.]

The case of *Stubley* v. *London and North Western Railway Company* (2) turned entirely on the question whether the company were bound to have a watchman at the station, and it was carefully considered in the case of *Stapley* v. *London, Brighton, and South Coast Railway Company* (1), judgment having been reserved for that purpose. If the company, by their acts, imply that there is no danger, the public are not bound to take the trouble to look about. Moreover, the plaintiff was not bound to shew that the deceased used caution, but the defendants to prove his negligence. There was equally strong evidence of contributory negligence in *Bilbee* v. *London, Brighton, and South Coast Railway Company.* (3)

BOVILL, C.J. In this case a nonsuit was directed by the learned judge, and I am of opinion that the nonsuit was right. It has been contended very ably by Mr. Jelf that the defendants were liable, either on the ground that the dangerous nature of the crossing rendered special precaution incumbent on them, or that by leaving the gate unfastened they in effect invited the deceased on to the line. In the view I take, however, it is not necessary to discuss these points. The deceased could not have supposed that the position of the ring shewed that the line was clear, because the coal train was standing before the gate; and if the crossing was rendered dangerous by obstructions to the view, it only made it more incumbent upon him to take due care. There is no evidence, however, that the deceased took any care or caution whatever. When he reached the first line of rails he could have seen three hundred yards, but it appears from the evidence that he did not look either to the right or left, but walked heedlessly on, and it was owing to this want of caution on his part that the accident

(1) Law Rep. 1 Ex. 21. (2) Law Rep. 1 Ex. 13.
(3) 18 C. B. (N.S.) 584; 34 L. J. (C.P.) 182.

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occurred. It is upon precisely similar grounds that Bramwell, B., bases his judgment in *Stubley* v. *London and North Western Railway Company*. (1)

WILLES, J. I am of the same opinion. I think that the evidence shews that if the deceased had looked out he might have stopped in time and saved himself; and the case of *Wyatt* v. *Great Western Railway Company* (2) shews that the Court is bound in such cases as the present to consider the question of contributory negligence in deciding whether there is any evidence to go to the jury of liability on the part of the defendants. I should be prepared, therefore, to decide this case on the grounds stated by my Lord had I not a still clearer opinion on the other part of the case. Actionable negligence must consist in the breach of some duty. Here it is not pretended that the defendants had acted improperly in the management of the trains, and the gates fulfilled all the requirements of the statute, so that the plaintiff has to rely on the self-imposed duty, as it is called, or precaution, as I should call it, of keeping the gates shut when trains were passing. First it is said that that was evidence that the crossing was a dangerous one; but though it might be primâ facie evidence of that, if it did not appear otherwise what the nature of the crossing really was, it is of no value when the other evidence, as here, shews what the real nature of the crossing was, and that there was no unusual danger. The precaution taken, therefore, must have been wholly voluntary, and it would be much to be deplored if the defendants' liability were increased by their taking additional precautions, whether from motives of humanity or discretion. Such, however, is not the case. If a person undertakes to perform a voluntary act, he is liable if he performs it improperly, but not if he neglects to perform it. Such is the result of the decision in the case of *Coggs* v. *Bernard*. (3)

Mr. Jelf is obliged to resort to the suggestion that the fastening the gate was in the nature of a signal, but the evidence shews that it was not a signal, but a precaution.

I will only add, with respect to the cases that have been cited,

(1) Law Rep. 1 Ex. 13. (2) 6 B. & S. 709; 34 L. J. (Q.B.) 204. (3) 1 Sm. L. C. 6th ed. 177.

that in *Bilbee* v. *London, Brighton, and South Coast Railway Company* (1) and *James* v. *Great Western Railway Company* (2) there were circumstances of exceptional danger, which rendered additional precautions necessary; and in *Stapley* v. *London, Brighton, and South Coast Railway Company* (3) there was an indication that the crossing was safe by the carriage gate being kept open, which, by statute, the company were bound to keep shut when a train was in sight, though whether that was sufficient to render the company liable was, I think (and the Court seem to have felt it so), a matter of great doubt.

MONTAGUE SMITH, J. I am also of opinion that the nonsuit was right. The first question is, whether there is any duty which the defendants discharged negligently. It is conceded that there is no such statutable duty, since the gate was a proper one. There are many cases in which a railway company is bound to take additional precautions, on account of special dangers, beyond those imposed by statute. For example, where a sharp corner, or any other cause, prevents persons from being able to avoid the danger of approaching trains by due care: *Bilbee* v. *London, Brighton, and South Coast Railway Company.* (1) So when the night, being dark, or smoke from neighbouring works prevents persons crossing the line from seeing any engine coming, they should be warned by lights or whistling: *James* v. *Great Western Railway Company.* (2) In the present case, however, there was nothing to oblige the defendants to take extra precautions. But it is said that the defendants voluntarily took upon themselves to fasten the gate when a train was approaching, and that its being open therefore, amounted to an invitation to the deceased to cross the line. I think, however, that is not the true inference to be drawn from the evidence. It was not proved that the gate was invariably fastened when there was danger, and therefore, putting it at the highest, it amounts to this, that when the gate was unfastened there was probably no train passing. That was not sufficient to absolve a foot passenger from the duty of taking the ordinary care which he would otherwise have been bound to do, and it

(1) 18 C. B. (N.S.) 584; 34 L. J. (C.P.) 182. (2) See note (3), p. 634.
(3) Law Rep. 1 Ex. 21.

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was the want of such care on the part of the deceased which was the cause of his death, and not any default on the part of the defendants.

Rule discharged.

Attorney for plaintiff: *G. W. Greenwood, for Brevitt, Darlaston.*
Attorney for defendant: *J. Blenkinsop.*

June 18.

EAGLE *v.* THE CHARING CROSS RAILWAY COMPANY.

Easement—Land or Interest therein injuriously affected within the Lands Clauses Consolidation Act, 1845*—Construction of Award.*

3 CP 87 — 93

An easement is an interest in land for the invasion of which compensation may be claimed under the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18.

An umpire, to whom was referred a claim for compensation in respect of damage sustained by the plaintiff in consequence of his premises being injuriously affected by the erection of certain works by the defendants under their act of parliament, found by his award that the company had by the erection of such works occasioned a diminution of light to the plaintiff's premises, whereby they were rendered less convenient and suitable for the requirements of his trade carried on therein, and assessed the amount of compensation due in respect of such damage at 656*l.* He further found, that, notwithstanding such diminution of light, the saleable value of the plaintiff's interest in the premises was not diminished (the value of property in the neighbourhood generally having become greatly enhanced by reason of the company's works); that, except the said damage in his trade or business, he had not sustained, and would not sustain, any damage in the premises; and that, except the compensation to which he was, or might be, by law entitled in respect of his said trade or business as aforesaid, he was not entitled to any compensation in the premises:—

Held, that the diminution of light was an injurious affecting of the plaintiff's interest in the premises, which entitled him to compensation under the statute; and that it was no answer, that, by reason of accidental circumstances, the saleable value of the premises was not diminished.

THE first count of the declaration stated that the defendants were a railway company incorporated by act of parliament, and the promoters of the undertaking authorized by the Charing Cross Railway and City Terminus Act, 1861; that, before and at the time of the happening of the matters of which the plaintiff hereinafter complained, he was possessed of an estate greater than as tenant from year to year of certain messuages, lands, tenements,

and hereditaments, with their appurtenances, near to which the defendants, in exercise of the powers contained in the said act and of the other acts incorporated therewith, had made and constructed a certain railway and works forming part of the said undertaking, and the said messuages and premises had been and were injuriously affected by the erection of the said works, by reason whereof the plaintiff sustained and will sustain damage for which he was and is entitled to claim and be paid compensation by the defendants; that, the plaintiff being so entitled, and the defendants not having made to the plaintiff satisfaction in respect thereof, the plaintiff claimed as compensation in respect thereof a sum exceeding 50*l.*, and desired to have the same settled by arbitration; that thereupon the plaintiff did, before the defendants had issued any warrant to the sheriff to summon a jury in respect of such lands, give to the defendants notice in writing of such his desire, stating in such notice the nature of the interest in respect of which he claimed compensation, and the amount of the compensation so claimed. It then proceeded to state that the plaintiff duly appointed one Anson to be the arbitrator on his behalf, that the defendants appointed one Ryde to be the arbitrator on their behalf, and that the arbitrators so appointed named one Shaw to be umpire to decide on any matters on which they might differ; that the arbitrators differed respecting the matters referred to them, and thereupon the said matters were duly referred to the umpire; that all things were done and happened and all conditions existed necessary to enable the umpire to make a valid award of and concerning the premises; and that the umpire made an award, whereby, after reciting the formal matters, and that the plaintiff had given notice to the company that he claimed to be interested in the messuages, &c., in the notice mentioned as lessee for a term of twenty-one years wanting ten days, and commencing from the 25th of December, 1861, but determinable at the option of the lessee or lessor at the expiration of the first seven or the first fourteen years of the term, and that he had sustained and would sustain damage by reason of the works of the company, for which he was entitled to claim compensation from the company, he awarded as follows:—"I find and award that the said company have in and by the execution of their works occasioned a diminution of light to the said messuages

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and premises in which the said G. C. Eagle claims to be interested as aforesaid, and that the said messuages and premises are consequently rendered less convenient and suitable for the purposes and requirements of the trade or business of a wool warehousekeeper carried on therein by Eagle as aforesaid than they otherwise would have been, and that Eagle has sustained and will sustain damage in his said trade or business by reason of such diminution of light: and I find and assess the amount of compensation to be paid to Eagle by the company for and in respect of such damage at the sum of 656*l.*: and I find and award that, notwithstanding such diminution of light as aforesaid, the saleable value of the interest so claimed by Eagle in the said messuages and premises as aforesaid is not diminished; and that, except the said damage in his said trade or business, Eagle has not sustained and will not sustain any damage in the premises; and that, except the compensation to which Eagle is or may be by law entitled in respect of his said trade or business as aforesaid, and the amount whereof I have hereinbefore found and assessed, he is not entitled to any compensation in the premises." Averment, that G. C. Eagle in the award mentioned was the plaintiff, that, the defendants not having made any offer to pay the plaintiff any sum whatever in respect of his claim to compensation according to the terms of the said act, he the plaintiff afterwards required the umpire to settle and determine the costs to be paid to him by the defendants under the Lands Clauses Consolidation Act, 1845, and thereupon the umpire ascertained and settled the same at 190*l.* 8*s.* 2*d.*, and that all things were done and happened and times elapsed necessary to entitle the plaintiff to be paid the two several sums of 656*l.* and 190*l.* 8*s.* 2*d.*, yet the defendants had not paid the same, or any part thereof.

Demurrer, on the ground that the declaration did not shew that compensation was awarded in respect of an injury done to the land of the plaintiff, or to his interest therein, or to any interest for which he was entitled to any compensation under the statute in the declaration mentioned, or otherwise. Joinder.

W. G. Harrison (*Keane, Q.C.*, with him), for the plaintiff. (1)

(1) There being cross-demurrers, the plaintiff began.

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The plaintiff claims compensation in respect of his premises being injuriously affected by reason of the works of the company. The umpire finds that the company have by the execution of their works occasioned a diminution of light to the plaintiff's premises, which rendered them less convenient and suitable for the purposes and requirements of his trade than they otherwise would have been. He therefore finds a state of things which would have entitled the plaintiff to maintain an action against the defendants, or to support an injunction, if the defendants were not protected by their act of parliament. The umpire then goes on to assess the amount of compensation due to the plaintiff in respect of such damage at 656*l*. He further finds that, notwithstanding such diminution of light, the saleable value of the plaintiff's interest in the premises is not diminished; that is, that, by reason of the general improvement in the value of property in the neighbourhood from the works constructed by the defendants, the plaintiff, if he wished to sell his interest, would obtain as good a price as if they had remained undeteriorated. The plaintiff, however, may choose to continue his business, and he is entitled to have his premises in as convenient and suitable a condition for that purpose as they were in before: *Senior* v. *Metropolitan Railway Company*. (1)

[BOVILL, C.J. The improvement is common to all the neighbourhood; but the injury to the plaintiff's premises by the diminution of light is peculiar to the plaintiff.]

Shield, for the defendants, was called upon to support the demurrer to the declaration. The declaration discloses no injury to the plaintiff's premises which entitles him to claim compensation under the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18. The award finds that the saleable value of the premises is not diminished. It therefore expressly negatives the plaintiff's right to any compensation. The only right to compensation is in respect of damage to an interest in land,—damage to the land itself. It may be conceded that the plaintiff would have been entitled to maintain an action for the diminution of light. But, whether or not an action would have lain, or an injunction could have been sustained, if the company's works had not been authorized

(1) 2 H. & C. 258; 32 L. J. (Ex.) 225.

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by an act of parliament, is merely a negative test. An action may lie in many cases where there would be no right to compensation: *Brand* v. *Hammersmith and City Railway Company.* (1)

[MONTAGUE SMITH, J. That part of the award was not contested either in the Queen's Bench or in the Exchequer Chamber in that case.]

This award conclusively shews that the damage was to the owner, and not to the premises.

[BOVILL, C.J. We must take the award with the submission. Is it meant to be contended that, if the company interfere with a man's house, so as to injure his trade by diminution of light, he cannot claim compensation?]

It is. Loss of trade is not a subject of compensation. In *Ricket* v. *Metropolitan Railway Company* (2), the Court of Queen's Bench held that the obstruction of a public highway so as to render the access of customers to the plaintiff's house less convenient, whereby the plaintiff's trade was diminished, was ground of compensation under the statute. That decision, however, was reversed in the Exchequer Chamber. (3) When the case came before the House of Lords (4), the majority of the noble lords decided it upon the ground that loss of trade by the temporary obstruction of a highway is not an injurious affecting of a tradesman's interest in his premises which entitles him to compensation under the Lands Clauses Consolidation Act,—affirming the judgment of the Exchequer Chamber. In the judgment delivered by Erle, C.J., in the Exchequer Chamber, it is distinctly laid down that no compensation is given under the statute unless land has been injuriously affected.

[BOVILL, C.J. The plaintiff's premises have sustained damage to the extent of 656*l.*, by reason of diminution of light. What answer is it to say that the premises will still sell for the same price as before, because property in the neighbourhood has increased in value? The plaintiff is not bound to sell.

KEATING, J. You have to shew that the premises are not injuriously affected.]

(1) Law Rep. 1 Q. B. 130, per Lush, J. 12 Jur. N.S. 336

(2) 5 B. & S. 149.

(3) 5 B. & S. 156; 34 L. J. (Q.B.) 257. 11 Jur. N.S. 260

(4) Law Rep. 2 H. L. 175.

That is shewn both by what the umpire has affirmed and by what he has negatived. He finds that the plaintiff has sustained damage in his trade. That is not an injury affecting the premises. He further finds that the marketable value of the premises is not diminished. "The trading carried on in the house is entirely distinct from the estate in the house:" per Erle, C.J., in *Ricket* v. *Metropolitan Railway Company*. (1) The learned judge goes on to say: "The statute has limited the liability to compensation in respect of injuries to definite rights of a permanent nature, that is, to rights in land. . . . . As to the argument that compensation is in practice allowed for the profits of the trade, *where land is taken*, the distinction is obvious; the company claiming to take land by compulsory process expel the owner from his property, and are bound to compensate him for all the loss caused by the expulsion; and the principle of compensation then is the same as in trespass for expulsion; and so it has been decided in *Re Jubb* v. *Hull Dock Company*." (2)

[KEATING, J. In *Ricket* v. *Metropolitan Railway Company* (1), the house was not affected at all. Here, however, the umpire finds that the plaintiff's warehouses are affected by diminution of light.

MONTAGUE SMITH, J. The invasion of a right of way, or of water, or of light, gives a cause of action. There was no cause of action in *Ricket's Case*.]

Chamberlain v. *West End of London and Crystal Palace Railway Company* (3) is also an authority to shew that a mere personal inconvenience or annoyance gives no claim for compensation, but that there must be injury to property. The umpire, therefore, in this case has clearly exceeded his jurisdiction.

W. G. Harrison was not called upon to reply.

BOVILL, C.J. I am of opinion that the plaintiff is entitled to judgment. The case now before us is not at all affected by the decision of the House of Lords in *Ricket* v. *Metropolitan Railway Company*. (4) It is clearly settled that loss of trade occasioned by

(1) 5 B. & S. 156, 162; 34 L. J. (Q.B.) 257, 260.

(2) 9 Q. B. 443, 457.

(3) 2 B. & S. 605, in Ex. Ch. 617.

(4) Law. Rep. 2 H. L. 175.

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an obstruction which affects the claimant only in common with all others who are interested in the use of the highway, is not the subject of compensation under the statute; and that it must be shewn that he might have maintained an action or an injunction if the works complained of had not been authorized by an act of parliament. In the present case it is plain upon the facts found by the arbitrator that an action might have been maintained; and therefore, upon that ground, the case is distinguishable from *Ricket* v. *Metropolitan Railway Company*. (1) Mr. Shield, however, contends that it does not follow that the party is entitled to compensation under the statute because the injury is one in respect of which there would have been a remedy by action. And he relies especially upon the opinion of the judges in the Exchequer Chamber as delivered by Erle, C.J., in that case. (2) This renders it necessary for us to refer to that judgment as well as to the opinions of the Lord Chancellor and Lord Cranworth in the House of Lords. (1) In the earlier part of the judgment the learned Chief Justice refers to several cases which shew that the claim for compensation can only be entertained where an action would have lain in the absence of a statutory authority to do the act complained of and where the injury is peculiar to the claimant, and not one which is common to all other persons and property in the neighbourhood. His lordship then goes on to say (3): "But, even if the action would have lain for this obstruction whereby the plaintiff was damaged in his trade, still such damage did not accrue to the plaintiff in his capacity of owner of an estate in land; and the title to compensation to which the statute relates is only in respect of land or an interest therein which has been injuriously affected." The Court then proceed to consider whether the obstruction there complained of was an injury to the plaintiff's interest in the house in respect of which he could have maintained an action, and they come to the conclusion that it was not. In dealing with the case of *Chamberlain* v. *The West End of London and Crystal Palace Railway Company* (4), they guardedly say (5) that "the houses themselves were found to be injuriously affected, and for that injury

(1) Law Rep. 2 H. L. 175.

(2) 5 B. & S. 156; 34 L. J. (Q.B.) 257.

(3) 5 B. & S. at p. 162.

(4) 2 B. & S. 605; 31 L. J. (Q.B.) 201.

(5) 5 B. & S. at p. 165.

alone the compensation was awarded." The Court never intended to say that an action would not lie for the invasion of an easement annexed to a house. If the works of the company interfere with the plaintiff's right of access to his premises, whether by raising or lowering a road, or obstruct the access of light thereto, it is clearly a case for compensation. When the case came before the House of Lords, the Lord Chancellor held that the foundation of the plaintiff's claim to compensation was too remote to have been the subject of an action. But his lordship goes on to say (1) that "the diversity of opinion which has prevailed amongst the judges as to the application of the clauses of the acts in question to such a claim as is now under consideration, renders it almost imperative upon the House to pronounce an authoritative final decision upon the whole case." "Upon an examination of the cases," he continues (2), "it will be seen that in most of them, where the claim to compensation was admitted, there was an actual injury to the house or land itself, either immediate or immediately consequential upon the acts done." He then refers to *Reg.* v. *Eastern Counties Railway Company* (3), where the company had lowered a road, whereby the claimant's land was injured and deteriorated, the access impeded, and additional fences rendered necessary; to *Glover* v. *North Staffordshire Railway Company* (4), where the complaint was that the plaintiff's private way appurtenant to his farm was obstructed by the company's works; and to *Reg.* v. *Great Northern Railway Company* (5), where the claim was in respect of the obstruction of the claimant's access to a ferry which was appurtenant to his house. *Chamberlain* v. *West End of London and Crystal Palace Railway Company* (6) is referred to in these terms (7): "The award found that the claimant was lessee of four houses on the highway across which the railway was constructed, and of eight other houses in the course of erection for the purpose of being used as dwelling-houses, fronting a new road running at right angles to the highway, and that, by reason of the obstruction of the highway by the construction of the railway across the same, the access to the houses of the plaintiff was, not-

(1) Law Rep. 2 H. L. at p. 188.
(2) Law Rep. 2 H. L. at p. 189.
(3) 2 Q. B. 347.
(4) 16 Q. B. 912; 20 L. J. (Q.B.) 376.
(5) 14 Q. B. 25; 19 L. J. (Q.B.) 25.
(6) 2 B. & S. 605; 31 L. J. (Q.B.) 201.
(7) Law Rep. 2 H. L. at p. 191.

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withstanding the substitution of the deviation road, rendered less convenient for the occupiers; and many persons would be prevented from passing the same; and the houses had thereby been rendered less suitable for being used and occupied as shops; and the value of the houses had been greatly diminished. The Court of Queen's Bench gave judgment for the plaintiff, without saying upon which of the heads of damage they thought he was entitled to compensation. But, upon error in the Exchequer Chamber, Erle, C.J., in delivering the opinion of the Court of error that the judgment of the Court below ought to be affirmed, relied entirely upon the facts found by the umpire, that the value of the houses was depreciated because the highway was stopped up, and the easy access which before existed to them was taken away, and that the houses were therefore injuriously affected within the words of the enactment referred to, and within the principle of law which governs cases of this description. This case must therefore be classed with the preceding cases, where the house or land of the person claiming compensation was itself injuriously affected by their works." In a subsequent part of his judgment, the Lord Chancellor, commenting upon the case of *East and West India Docks and Birmingham Junction Railway* v. *Gattke* (1), says (2): "One of the grounds of complaint was that the defendant's customers had been compelled by the obstruction occasioned by the company's works to quit the side of the road upon which the complainant's shop was situated before they arrived at his shop, and to cross to the opposite side of the road in order to pass along; by reason whereof, during several weeks, he had sustained a great loss in his trade. The Lord Chancellor (Truro) dissolved an injunction which had been granted by Wigram, V.C., and allowed the plaintiff to proceed to have the amount of compensation assessed by a jury. But, in addition to the above-mentioned ground of complaint, the plaintiff in that case alleged that he had sustained injury in consequence of the dust and dirt occasioned by the company having damaged his goods; and he also alleged that he had been injuriously affected and injured by the company having stopped up a passage or lane along which he was entitled to a right of way or access to the entrance at the back of his premises;

(1) 3 M. N. & G. 155; 20 L. J. (Ch.) 217. (2) Law Rep. 2 H. L. at p. 195.

both of which were direct and not consequential injuries. And the Lord Chancellor, without distinguishing the heads of claims, said: 'I see no reasonable doubt that, if the defendant has in fact sustained damage from the causes alleged, he is a person entitled to claim compensation, and that he is entitled to have the question submitted to a jury.'" It is unnecessary to pursue the subject further, except for the purpose of adverting to a part of Lord Cranworth's judgment, where he says (1): "Both principle and authority seem to me to shew that no case comes within the purview of the statute, unless where some damage has been occasioned to the land itself, in respect of which, but for the statute, the complaining party might have maintained an action. The injury must be actual injury to the land itself, as, by loosening the foundations of buildings on it, *obstructing its light* or its drains, making it inasccessible by lowering or raising the ground immediately in front of it, or by some such physical deterioration." Let us see whether the premises of the claimant in this case have been injuriously affected within the principle thus authoritatively laid down. The action is brought upon the award of an umpire, whose duty it was to assess the amount of compensation due, but who had no power to determine the rights of the parties. The declaration states that the plaintiff was possessed of an estate in certain premises, and that his interest therein had been and was injuriously affected by the erection of the defendants' works, by reason whereof he had sustained damage. That is an allegation of a matter of fact which must be taken to have been truly made. The declaration then goes on to aver the appointment of arbitrators and an umpire to determine of and concerning the premises. It then sets out the award made by the umpire of and concerning the matters so referred, whereby he found that the defendants had in and by the execution of their works occasioned a diminution of light to the plaintiff's premises, and that they were in consequence rendered less convenient and suitable for the purposes and requirements of the plaintiff's trade carried on therein, and that the plaintiff had sustained and would sustain damage in his said trade by reason of such diminution of light; and he assessed the compensation to be paid to the plaintiff in respect of such damage at 656*l*. The true and only effect of

(1) Law Rep. 2 H. L. at p. 198.

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that finding is that the plaintiff's interest in the premises is injuriously affected by the diminution of light: and that is not got rid of by the subsequent finding. Mr. Shield admitted, and could not help admitting, that the diminution of light was a damage in respect of which the plaintiff, but for the act of parliament authorizing the works, might have maintained an action. The diminution of light is clearly an injury to the premises in respect of which the plaintiff is entitled to claim compensation. The case is therefore entirely distinguishable from that of *Ricket* v. *Metropolitan Railway Company*. (1) Mr. Shield, however, further urged that the diminution of light has occasioned no damage to the premises, because the umpire has thought fit to go on and state that, notwithstanding such diminution of light, the saleable value of the interest so claimed by the plaintiff in the premises was not diminished, and that, except the compensation to which the plaintiff was or might be by law entitled in respect of his trade, he was not entitled to any compensation in the premises. Mr. Shield contends that the meaning of that is that no damage has been done to the premises. I do not so read the award. The amount of compensation the plaintiff is entitled to for the diminished light to his premises is not to be estimated with reference to what they will sell for. The plaintiff is not bound to sell. In the case of premises in a dilapidated state, the whole value is in the site: is it to be said that therefore the owner is to recover nothing for an obstruction to his lights? I think the true test is whether damage has been sustained by reason of the works of the company. The umpire having found that, the matter seems to me to be altogether free from doubt.

KEATING, J. I am of the same opinion: and I should have regretted much if we had felt ourselves compelled to come to any other conclusion. There can be no doubt that, but for their act of parliament, an action would have lain against the defendants for the injury to the plaintiff's premises by the diminution of light thereto. The umpire finds that by reason of such diminution of light the plaintiff's premises are rendered less convenient and

(1) 5 B. & S. 149; in Ex. Ch. 5 B. & S. 156; 34 L. J. (Q.B.) 257: in the House of Lords, Law Rep. 2 H. L. 175.

suitable for the requirements of his trade to the extent of 656*l*. If the award had stopped there, no ingenuity could have suggested that it was not a perfectly good award. It would be strange indeed if the plaintiff's right of action for that damage should be taken away by the act of parliament, and that he should have no claim for compensation under it. The only difficulty arises here from what the umpire has thought fit to insert at the end of the award. It has been insisted that his intention was, to shew that the sum assessed was in respect of loss of trade, and that he meant to negative any injurious affecting of the premises themselves: and in support of this view *Ricket* v. *Metropolitan Railway Company* (1) was relied on. Prior to the decision of that case, it was supposed by some of the Courts that, if the works of a public company interfered incidentally with the access to premises, that was a diminution of the value of the land in respect of which compensation was assessable. But it is now clearly settled by the decision of the Exchequer Chamber in that case, affirmed by the highest tribunal, that compensation can only be claimed where land itself or an interest in land is injuriously affected; and that a damage to the plaintiff's trade by the obstruction of access to his premises by a public highway is too remote. In the present case, the award finds that the premises are directly injured by diminution of light. I therefore agree with the rest of the Court that the plaintiff is entitled to judgment.

MONTAGUE SMITH, J. I am of the same opinion. To entitle the plaintiff to claim compensation under the statute, it must no doubt be shewn that his interest in the land has been injuriously affected by the execution of the company's works. I think that is shewn upon the face of this award. It finds in effect that the light to the plaintiff's premises has been obstructed, and that, by reason of that obstruction, the premises have been rendered less convenient and suitable for the purposes and requirements of the plaintiff's trade. It seems to me that that is a damage to the plaintiff's interest in the premises immediately flowing from the act of the defendants. If it could be successfully contended that

(1) 5 B. & S. 149: in Ex. Ch. 5 B. & S. 156; 34 L. J. (Q.B.) 257: in the House of Lords, Law Rep. 2 H. L. 175.

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the obstruction of light to the premises is not an injurious affecting of the land, the same argument might equally apply to a case where the flow of water to a mill was obstructed. In either case the injury is not limited to the trade: it is a permanent injury to the tenant's interest in the land itself. It is impossible that such an argument can be allowed to prevail. The case of *Ricket* v. *Metropolitan Railway Company* (1), which has given rise to so much discussion, is no authority in favour of the defendants. It is conceded that the decision of the House of Lords does not govern this case. It was there held, overruling *Wilks* v. *Hungerford Market Company* (2), that a temporary obstruction of a public highway, causing loss of trade to the plaintiff by preventing the convenient access of customers to his premises, was not the subject of compensation. But the House of Lords did not intend to lay it down, that an injury to land by the obstruction of a private right of way thereto would not give the owner of the land a right to claim compensation. Nothing of the sort is deducible from the judgments delivered by either of the learned lords in that case. What Mr. Shield mainly relied on was, some expressions of Erle, C.J., in delivering the judgment of the Exchequer Chamber. (3) Anything that fell from that learned and respected judge, whether in delivering a judgment of the whole Court, or in expressing merely his own individual opinion, is entitled to the greatest respect and consideration. But I do not find anything in that judgment which at all supports the defendants' case. All he meant to say was, that goodwill of a business is not an interest in land, or the subject of compensation for its loss under the Lands Clauses Consolidation Act, 1845. "The statute," he says (4), "limited the liability to compensation in respect of injuries to definite rights of a permanent nature, that is, to rights in land." It is to be inferred from that that an obstruction to a right to light or water, or of a right of way appurtenant to land, comes within the words "injurious affecting," and would be distinguished from the circumstances of the case then under consideration. Upon the whole, it seems to me that

11 Jur. N.S. 260

(1) 5 B. & S. 149; in Ex. Ch. 5 B. & S. 156; 34 L. J. (Q.B.) 257; in the House of Lords, Law Rep. 2 H. L. 175; 36 L. J. (Q.B.) 205.

(2) 2 Bing. N. C. 281.

(3) 5 B. & S. 156; 34 L. J. (Q.B.) 257. 11 Jur. N.S. 260

(4) 5 B. & S. at p. 163. 11 Jur. N.S. 261

the right which has been invaded here is a right to an interest in land, and that the damage in respect of which the plaintiff claims compensation is not too remote, but is directly consequent upon the loss of the plaintiff's property in the light. No difficulty could have arisen here but for the umpire having inserted an impertinent averment in his award. That the saleable value of the premises has not been diminished is not the only and certainly not a conclusive test. A man is not to be driven to sell his property. He may choose to continue his business. I entertain no doubt whatever as to the conclusion we ought to come to.

Judgment for the plaintiff.

Attorneys for plaintiff: *Drake & Son.*
Attorney for defendants: *J. Freeland.*

[IN THE EXCHEQUER CHAMBER.]

June 21.

APPLEBY AND ANOTHER *v.* MYERS.

Contract, Construction of—Complete Performance prevented by a Misfortune beyond the Control of either Party.

Where A. contracts to do work and supply materials upon the premises of B. for a specific sum, to be paid on completion of the whole, A. is not entitled to recover anything until the whole work is completed, unless it be shewn that the performance of his contract was prevented by the default of B.

The plaintiffs contracted to erect certain machinery on the defendant's premises at specific prices for particular portions, and to keep it in repair for two years,—the price to be paid upon the completion of the whole. After some portions of the work had been finished, and others were in the course of completion, the premises with all the machinery and materials thereon were destroyed by an accidental fire:—

Held,—reversing the judgment of the Court of Common Pleas,—that both parties were excused from the further performance of the contract; but that the plaintiffs were not entitled to sue in respect of those portions of the work which had been completed, whether the materials used had become the property of the defendant or not.

APPEAL from a judgment of the Court of Common Pleas, in favour of the plaintiffs upon a special case, the report of which will be found ante, vol. i. p. 615.

Hannen (*Lumley Smith* with him), for the defendant. It is a

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general rule that, when a person has undertaken to do certain work to be paid on completion, he is not entitled to payment for a portion, unless he is prevented from completing the work by the wrongful act of his employer. The authority for this is *Cutter* v. *Powell*. (1) The judgment of the Common Pleas, now appealed from, makes an exception in the case of work done upon property of the employer, the completion of which work is prevented, not by any default on the part of the contractor, but in consequence of the accidental destruction of the premises upon which the work was being done; and this upon the ground that there is, in such a case, an implied contract that the premises shall be kept in a state in which the work can be performed on it.

[MARTIN, B. In Chitty on Contracts, 7th ed. p. 514, it is said that a workman is entitled to be paid for the work that he has done, though it be destroyed by an accidental fire before the whole is completed, unless by the uniform custom of the particular trade payment is not to be made until the work is completed.]

In the present case the exception arises from the express terms of the contract, instead of from the custom of the trade. *Adlard* v. *Booth* (2) is strongly in the defendant's favour.

[BLACKBURN, J. In that case the plaintiff did receive payment for the books which he had actually delivered, though the reporter did not so understand it, and has made it appear to be otherwise in the side-note.]

The Roman, Scotch, and American laws are all opposed to the principle upon which the judgment of the Court below is based: see Story on Bailments, s. 426; *Bromley* v. *Smith* (3), in which all the authorities upon the subject are referred to; *Wilson* v. *Knott* (4); 1 Bell's Commentaries, 6th ed. s. 8, p. 147; Pothier's Contrat de Louage, chap. ii. s. 433. See also, for the English law, Addison on Contracts, 4th ed. 450; and, for the French law, the Code Civil, articles 1788—1790.

[BLACKBURN, J. The general rule of law, as I have always

(1) 2 Smith's L. C. 1.
(2) 7 C. & P. 108.
(3) 5 Alabama Rep. (N.S.) 143.
(4) 3 Humph. Rep. 473.

understood it, is, Res perit domino suo; and it may depend, therefore, upon whether the property in any of the materials supplied by the plaintiffs had passed to the defendant.]

That maxim of law is in the defendant's favour. The plaintiffs lose their work, and the defendant his property.

[BRAMWELL, B. If a man agrees to deliver a chattel, and it is burnt before delivery, is he excused?]

If the property had passed before delivery, he would be: *Williams* v. *Lloyd* (1), where the defendant agreed to deliver a horse upon request, and the horse died before request made, and he was held excused. The broad principle is, that where the completion of the work is prevented by the act of God, neither party has a remedy against the other: *Bayne* v. *Walker*. (2)

Holl, for the plaintiffs. It was assumed by the Court below, that the property in the work which had been done passed to the defendant; and as to some of it, at any rate, that clearly was the case. There is no doubt as to the general principle, that payment cannot be claimed until completion of the contract. But the law has, for general convenience, engrafted upon that rule certain exceptions; and the question is, whether the present case does not form one of them. It is admitted that if the full performance of the work had been prevented by the act of the defendant, the law would imply a contract to pay on a quantum meruit, instead of leaving the plaintiffs to an action for the breach of contract in not permitting the plaintiffs to complete the work: *Planché* v. *Colburn*. (3) The true principle is, that where work is done or materials supplied on the land of another, if the completion of the contract is prevented by vis major, the law implies a contract on the part of the person for whom and on whose land the work has been done, and whose property the materials have become, to pay for so much of the work and materials as have been done and supplied. That proposition is supported by the authority of The Digest, and also by that of several eminent foreign jurists, and amongst them of Duranton, Troplong, Pothier, and Domat. In Digest, Lib. 19, tit. ii. Locati Conducti, l. 36, De Aversione, the rule is laid down: "Opus quod aversione locatum est donec adprobetur, conductoris periculum est.

(1) Sir W. Jones, 179. (2) 3 Dow, 233.
(3) 8 Bing. 14.

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Quod vero ita conductum sit, ut in pedes mensurasve præstetur, eatenus conductoris periculo est, quatenus admensum non sit; et in utraque causa nociturum locatori, si per eum steterit, quominu opus adprobetur vel admetiatur. Si tamen vi majore opus prius interciderit quam adprobaretur, locatoris periculo est; nisi si aliud actum sit."

[BLACKBURN, J. Suppose a riotous mob entered the defendant's premises and broke the machinery before the work was completed, according to the principle you contend for the plaintiffs would be excused from repairing and completing the work.]

The argument must go that length. Neither party being in fault, the question is, which is to be the sufferer. The work being out of the control of the workmen, and the customer being the dominus of the property, the maxim Res perit domino suo applies.

[BLACKBURN, J. L. 37 is more consonant with good sense: "Si prius quam locatori opus probaretur, vi aliqua consumptum est, detrimentum ad locatorem ita pertinet si tale opus fuit ut probari deberet." Here, no part of the work was, according to the terms of the contract, to be paid for until the whole was completed.]

"Agreements bind not only as to what is expressed therein, but further as regards all the consequences which equity, usage, or law attribute to an obligation by its nature:" Code Civil, art. 1135. And that general principle is not confined to the French law. Extraordinary and unlooked-for events are never in terms provided for. The machinery, though not completed, would enhance the marketable value of the defendant's premises. In the same title of the Digest, L. 59, the following case is put: "Marcius domum faciendam a Flacco conduxerat: deinde operis parte effecta terræ motu concussum erat ædificium. Massurius Sabinus, si vi naturali, veluti terræ motu, hoc acciderit, Flacci esse periculum."

[BLACKBURN, J. If the contract were to pay for the building on completion it would be like *Sinclair* v. *Bowles.* (1)

SHEE, J. The note to the last passage you cite throws you back upon l. 36.]

That is a note by an unknown commentator. In Domat's Lois Civiles, liv. tit. iv. s. viii. art. 8, it is said: "Si on a donné quelque matière à un ouvrier pour faire un ouvrage à un certain prix de

(1) 9 B. & C. 92; 4 M. & R. 1.

l'ouvrage entier, l'entrepreneur n'aura satisfait à son engagement et n'en sera déchargé qu'après que tout l'ouvrage étant vérifié, il se trouvera tel qu'il doive être reçu. Et si c'est un travail qui soit de plusieurs pièces, ou à la mesure, et à un certain prix pour chaque pièce ou chaque mesure, l'entrepreneur sera déchargé à proportion de ce qui sera compté ou mesuré et trouvé bien fait. Et il portera au contraire la perte de son ouvrage, et les dommages et intérêts du maître, s'il y en a, pour ce qui se trouverait n'être pas de la qualité dont il devait être. Que si dans l'un et dans l'autre cas de ces deux marchés la chose périt par un cas fortuit avant que l'ouvrage soit vérifié, le maître en portera la perte, et devra le prix de l'ouvrage, surtout s'il était en demeure de le vérifier, si ce n'est qu'il parût que l'ouvrage ne fût pas tel qu'il dût être reçu."

[LUSH, J. That assumes the work to be completed.]

Article 9 says: "Si un architecte ayant entrepris de faire une maison ou autre édifice, et qu'ayant achevé la construction, ou seulement une partie, elle vienne à périr par un debordement, par un tremblement de terre, ou autre cas fortuit, toute la perte sera pour le maître, et il ne laissera pas de devoir, et les matériaux fournis par l'entrepreneur, et ce qui se trouvera dû de la façon de l'édifice; car la déliverance lui était faite de tout ce qui était bâti sur son fonds. Mais si le bâtiment périt par le défaut de l'ouvrage l'architecte perdra son travail avec ce qui sera péri des matériaux, et il sera de plus tenu du dommage que le maître en pourra souffrir." Duranton, Cours de Droit Français. vol. ix. tit. 8, Du Contrat de Louage, s. 250, ed. 1833, is to the same effect. Speaking of L. 36 of the Digest, he says: "Mais le jurisconsulte, en mettant les risques à la charge du conducteur tant que l'ouvrage convenu per aversionem n'a pas été approuvé par le locateur, ou que l'ouvrage convenu au pied ou à la mesure n'a pas été mesuré, n'entend parler que des risques ordinaires, et non des cas fortuits extraordinaires; car il ajoute de suite: 'Si tamen vi majore opus priùs interciderit quàm adprobaretur, locatoris periculo est; nisi si aliud actum sit: non enim ampliùs præstari locatori oporteat, quàm quod sua cura atque opera consequutus esset.' Le jurisconsulte Javolenus dit également, dans la loi suivante, que si l'ouvrage vient à périr par quelque accident de force majeure, avant d'avoir été ap-

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prouvé par celui qui l'a donné à faire, la perte en est supportée par ce dernier, si toutefois l'ouvrage était tel qu'il dût été reçu: 'Si priusquàm locatori opus probaretur, vi aliquâ consumptum est detrimentum ad locatorem ità pertinet, si tale opus fuit ut probari deberet.' Et il est bien clair que c'est même quant au prix de la main d'œuvre, que la perte est à la charge de celui qui a donné l'ouvrage à faire, puisque ce ne peut être que sous ce rapport qu'il y a lieu à la question de savoir si l'ouvrage a été fait comme il devait l'être." The same distinction is laid down in Pothier's Contrat de Louage, c. 3, ss. 435, 436. In a case decided in the French Cour de Cassation, reported in Dalloz's Jurisprudence Général for 1861, p. 105, it is laid down that "La perte par force majeure, de constructions en cours d'exécution, est pour le compte du propriétaire du sol dans lequel ces constructions sont incorporées, quoique l'entrepreneur en ait fourni les matériaux et que la perte soit survenue avant la réception des travaux, ou une mise en demeure de les vérifier." The case of *Bromley* v. *Smith* (1) is certainly opposed to this view. But that case is mainly founded on a passage in Story on Bailments, s. 426, where the Digest, Lib. 19, tit. 2, l. 59, and also Bell's Commentaries, vol. i. p. 146, 5th ed., are not referred to.

[MARTIN, B. In the notes to *Cutter* v. *Powell* (2), it is said that the mere fact of the part performance having been beneficial is not sufficient to render the party benefited liable; but that there must be circumstances to raise an implied promise to pay for the work done.]

The Court will so construe the contract as to carry out, if possible, the intention of the parties: and it is evident that both parties here contemplated the premises continuing to exist in a condition to receive the work: *Withers* v. *Reynolds* (3); *Clay* v. *Yates*. (4) Another class of cases, of which *Rugg* v. *Minett* (5) is a leading one, shews that where goods which have been bought are destroyed before delivery, the vendor is excused from delivering them, and is yet entitled to the price, if the property had

(1) 5 Alabama Rep. (N.S.) 143.
(2) 2 Smith's L. C. 1.
(3) 2 B. & Ad. 882.
(4) 1 H. & N. 73; 25 L. J. (Ex.) 237.
(5) 11 East, 210.

passed to the vendee prior to their destruction. This is also laid down by Pothier, as quoted in Blackburn on the Contract of Sale, p. 172.

[BLACKBURN, J. That was put by Pothier on the ground that the price is not paid for the delivery, but for the vesting of the goods.]

Menetone v. *Athawes* (1) is a direct authority in the plaintiffs' favour. Whether the contract be for an entire sum or not, if it is to do a certain work it is an entire contract, and no payment is due until the whole is finished: and such was the fact in that case. The authority cited from Pothier's Contrat de Louage, c. 3, is also in the plaintiffs' favour. There is nothing there to shew that the work was to be done on the premises of the employer.

[BLACKBURN, J., referred to *Roberts* v. *Havelock*. (2)]

In *Taylor* v. *Caldwell* (3), Blackburn, J., delivering the judgment of the Court, enunciates the principle by which this case is to be governed. "There seems," he says, "no doubt that, where there is a positive contract to do a thing not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract has become unexpectedly burdensome, or even impossible. The law is so laid down in Roll. Abr. vol. i. p. 450, Condition (G), and in the note to *Walton* v. *Waterhouse* (4), and is recognised as the general rule by all the judges in the much discussed case of *Hall* v. *Wright*. (5) But this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied: and there are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfilment of the contract arrived some particular thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence

(1) 3 Burr. 1592.
(2) 3 B. & Ad. 404.
(3) 3 B. & S. 826, 833; 32 L. J. (Q.B.) 164.
(4) 2 Wms. Saund. 421*a*, 6th ed.
(5) E. B. & E. 746.

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as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor."

Hannen, in reply. If the parties have thought fit to contract that the work shall be paid for when completed, why should the Court imply any other contract? In the absence of any illegality, the Court must give effect to the contract as they find it. The opinions of foreign jurists, however valuable to aid in the elucidation of a doubtful principle, cannot affect the decision here.

[LUSH, J. The Court below does not profess to found its judgment upon the Civil law, but it assumes that there is an implied warranty that the premises shall remain in a state to receive the work. If that be so, the plaintiffs should have recovered the whole sum.]

The case does not shew that the property in the machinery which was fixed passed to the defendant. The statement that they were fixed to the premises must be read with reference to the subject matter. These would be trade fixtures. Besides, the plaintiffs might have removed one piece of machinery and substituted another.

Cur. adv. vult.

June 21. The judgment of the Court (Martin, B., Blackburn, J., Bramwell, B., Shee and Lush, JJ.), was delivered by

BLACKBURN, J. This case was partly argued before us at the last sittings; and the argument was resumed and completed at the present sittings.

Having had the advantage of hearing the very able arguments of Mr. Holl and Mr. Hannen, and having during the interval had the opportunity of considering the judgment of the Court below, there is no reason that we should further delay expressing the opinion at which we have all arrived, which is, that the judgment of the Court below is wrong, and ought to be reversed.

The whole question depends upon the true construction of the contract between the parties. We agree with the Court below in

thinking that it sufficiently appears that the work which the plaintiffs agreed to perform could not be performed unless the defendant's premises continued in a fit state to enable the plaintiffs to perform the work on them; and we agree with them in thinking that, if by any default on the part of the defendant, his premises were rendered unfit to receive the work, the plaintiffs would have had the option to sue the defendant for this default, or to treat the contract as rescinded, and sue on a quantum meruit. But we do not agree with them in thinking that there was an absolute promise or warranty by the defendant that the premises should at all events continue so fit. We think that where, as in the present case, the premises are destroyed without fault on either side, it is a misfortune equally affecting both parties; excusing both from further performance of the contract, but giving a cause of action to neither.

Then it was argued before us, that, inasmuch as this was a contract of that nature which would in pleading be described as a contract for work, labour, and materials, and not as one of bargain and sale, the labour and materials necessarily became the property of the defendant as soon as they were worked into his premises and became part of them, and therefore were at his risk. We think that, as to a great part at least of the work done in this case, the materials had not become the property of the defendant; for, we think that the plaintiffs, who were to complete the whole for a fixed sum, and keep it in repair for two years, would have had a perfect right, if they thought that a portion of the engine which they had put up was too slight, to change it and substitute another in their opinion better calculated to keep in good repair during the two years, and that without consulting or asking the leave of the defendant. But, even on the supposition that the materials had become unalterably fixed to the defendant's premises, we do not think that, under such a contract as this, the plaintiffs could recover anything unless the whole work was completed. It is quite true that materials worked by one into the property of another become part of that property. This is equally true, whether it be fixed or movable property. Bricks built into a wall become part of the house; thread stitched into a coat which is under repair, or planks and nails and pitch worked into a ship

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under repair, become part of the coat or the ship; and therefore, generally, and in the absence of something to shew a contrary intention, the bricklayer, or tailor, or shipwright, is to be paid for the work and materials he has done and provided, although the whole work is not complete. It is not material whether in such a case the non-completion is because the shipwright did not choose to go on with the work, as was the case in *Roberts* v. *Havelock* (1), or because in consequence of a fire he could not go on with it, as in *Menetone* v. *Athawes*. (2) But, though this is the primâ facie contract between those who enter into contracts for doing work and supplying materials, there is nothing to render it either illegal or absurd in the workman to agree to complete the whole, and be paid when the whole is complete, and not till then: and we think that the plaintiffs in the present case had entered into such a contract. Had the accidental fire left the defendant's premises untouched, and only injured a part of the work which the plaintiffs had already done, we apprehend that it is clear the plaintiffs under such a contract as the present must have done that part over again, in order to fulfil their contract to complete the whole and "put it to work for the sums above named respectively." As it is, they are, according to the principle laid down in *Taylor* v. *Caldwell* (3), excused from completing the work; but they are not therefore entitled to any compensation for what they have done, but which has, without any fault of the defendant, perished. The case is in principle like that of a shipowner who has been excused from the performance of his contract to carry goods to their destination, because his ship has been disabled by one of the excepted perils, but who is not therefore entitled to any payment on account of the part-performance of the voyage, unless there is something to justify the conclusion that there has been a fresh contract to pay freight pro ratâ.

On the argument, much reference was made to the Civil law. The opinions of the great lawyers collected in the Digest afford us very great assistance in tracing out any question of doubtful principle; but they do not bind us: and we think that, on the principles of English law laid down in *Cutter* v. *Powell* (4), *Jesse* v.

(1) 3 B. & Ad. 404.
(2) 3 Burr. 1592.
(3) 3 B. & S. 826; 32 L. J. (Q.B.) 164.
(4) 6 T. R. 320; 2 Smith's L. C. 1.

Roy (1), *Munroe* v. *Butt* (2), *Sinclair* v. *Bowles* (3), and other cases, the plaintiffs, having contracted to do an entire work for a specific sum, can recover nothing unless the work be done, or it can be shewn that it was the defendant's fault that the work was incomplete, or that there is something to justify the conclusion that the parties have entered into a fresh contract.

We think, therefore, as already said, that the judgment should be reversed.

Judgment reversed.

Attorney for plaintiffs: *J. S. Salaman.*

Attorneys for defendant: *Lewis, Munns, Nunn, & Longden.*

[IN THE EXCHEQUER CHAMBER.]

June 20.

MEYERSTEIN *v.* BARBER AND OTHERS.

Bill of Lading, how long in Force—Goods landed at a Sufferance Wharf with a "Stop" for Freight—What a sufficient Possession to maintain Trover.

A bill of lading remains in force until there has been a complete delivery of the goods thereunder to a person having a right to receive them.

A. was indorsee of a bill of lading for cotton, drawn in a set of three, making the cotton deliverable in London on payment of freight. The cotton had been recently landed under an entry made by A., and carried to a sufferance wharf in the port of London, where it remained with a stop thereon for freight. On the 4th of March, 1865, A. obtained from the plaintiff an advance of 2500*l.* on the deposit of *two* copies of the bill of lading; A. fraudulently retaining the *third* copy, which the plaintiff supposed to be in the hands of the captain. On the 6th and 7th of March (the stop for freight being then removed), A., who had in February instructed the defendants, cotton-brokers, to take samples of the cotton and to offer it for sale, obtained from them advances to the amount of 2000*l.* on the deposit of the *third* copy of the bill of lading; and on the 11th, being then informed of the prior advance by the plaintiff, they sent such third copy of the bill of lading to the wharfinger, and procured the cotton to be transferred into their names, and afterwards sold it and received the proceeds:—

Held,—affirming the judgment of the Court of Common Pleas,—that the bill of lading, when deposited with the plaintiff, retained its full force and effect, and consequently that there was a valid pledge of the cotton to the plaintiff before the advances made to A. by the defendants.

APPEAL from a decision of the Court of Common Pleas upon a rule to set aside a verdict for the plaintiff and enter a verdict for the defendants, reported antè, p. 38.

(1) 1 C. M. & R. 316. (2) 8 E. & B. 738. (3) 9 B. & C. 92.

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The declaration contained counts for money received to the use of the plaintiff, for interest, for money due upon accounts stated, and in trover for goods.

The defendants pleaded to the money counts never indebted, and, to the count in trover, not guilty, and not possessed. Issue thereon.

The cause came on for trial before Erle, C.J., in London, on the 28th of June, 1866, when the facts stated in the following case were admitted or given in evidence; and thereupon, by the direction of the Chief Justice, a verdict was entered for the plaintiff for 2019*l.* and interest, if the Court should think the plaintiff entitled to interest; leave being reserved to the defendants to move to enter the verdict for them,—the Court to be at liberty to draw any inferences of fact:—

1. The plaintiff is a merchant carrying on business in London, and the defendants are colonial brokers in London, carrying on business under the firm of Barber, Newphew, & Co.

2. In August, 1864, De Souza, Cammiade, & Co., of Madras, shipped at Coconada, in India, 277 bales of cotton, by a ship called the *Acastus*, for London, and received from the master a bill of lading in three parts, in the margin of which the cotton was described as, "$\frac{S}{R}$ & Co. 205 bales," and "$\frac{S}{W}$ & Co. 72 bales;" each part thereof being signed by the master.

3. In August, 1864, the *Acastus* sailed from Coconada with the 277 bales of cotton on board thereof, bound for London.

4. The firm of F. de Souza, Cammiade, & Co., named in the bill of lading, were merchants carrying on business at Madras; and they consigned the 277 bales in question to J. C. Azémar & Co., merchants in London, for sale on commission, on account of De Souza, Cammiade, & Co., and sent them an invoice of the consignment; and F. de Souza, Cammiade, & Co., drew four bills of exchange for (in all) 6000*l.* upon J. C. Azémar & Co. against the cotton; and F. de Souza, Cammiade, & Co., having received the three parts of the bill of lading, indorsed each of such three parts in blank, and sold their drafts on Azémar & Co. to the Chartered Mercantile Bank of India; and the three parts of the bill of lading so indorsed by F. de Souza, Cammiade, & Co., were delivered by them to the bank attached to the bills of exchange,

as security for their due acceptance and payment. The bills of exchange were accepted by Azémar & Co. by way of advance to F. de Souza, Cammiade, & Co., on the cotton, and fell due as follows:—3000*l.*, due 12th January, 1865; 1000*l.*, due 3rd March, 1865; 1000*l.*, due 22nd March, 1865; 1000*l.*, due 22nd March, 1865; together 6000*l*; and such accepted bills of exchange, with the three parts of the bill of lading so attached thereto, were held by the London branch of the Chartered Mercantile Bank of India for value prior to January, 1865, and until they were taken up as hereinafter mentioned.

5. At the end of 1864, Azémar & Co. retired from trade, and gave up their business (including the above consignment) to Mr. S. Abraham, their manager, who continued the business under the firm of S. Abraham & Co.

6. In January, 1865, Mr. De Souza, of the said firm of F. de Souza, Cammiade, and Co., of Madras, was in London, and Mr. Azémar, having informed him of the transfer of his business to Abraham, applied at Abraham's request to De Souza to assist Abraham in money matters until the *Acastus* should arrive, on the ground that the cotton would be examined by the brokers, and money advanced on it, advances not being obtainable on the bill of lading. De Souza thereupon agreed to assist Abraham; and, Azémar's late firm's name being known in the market, he, Azémar, under the style of J. C. Azémar & Co., drew on F. de Souza, Cammiade, & Co., of Madras, four bills of exchange for 1500*l.* each, at six months' sight, antedating the bills 10th of August, 1864; and De Souza, in London, accepted these four bills in the name of his firm of F. de Souza, Cammiade, & Co., payable in London, and falling due on the 24th of March, 1865. Azémar & Co. indorsed the bills in blank, and delivered them to Abraham & Co., who discounted three of them (together 4500*l.*) with Smith, Payne, & Smith, bankers in London (the fourth bill coming into the hands of the plaintiff, as mentioned in paragraph 14 of this case). Each of these four 1500*l.* bills contained in the body thereof, immediately before the signature of the drawers, the following words: "Value in ourselves, which place to account cotton per *Acastus* as, advised by."

7. On the 31st of January, 1865, the *Acastus* arrived at London

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with the 277 bales of cotton on board thereof; but the fact of her arrival was not known *to the plaintiff* until subsequently to the advance made by him on the 4th of March, 1865, as mentioned in paragraph 19 of this case. The vessel went into the St. Katharine's Docks, which are situate on the Middlesex side of the Thames, and on the 2nd of February, 1865, *Abraham made an entry of the cotton at the Custom House for the landing and warehousing thereof at Cotton's Wharf,* which is a public sufferance wharf situate on the Surrey side of the Thames, and belongs to Messrs. Scovell, wharfingers. This entry was in the form given by the Statute 16 & 17 Vict. c. 107, s. 60. Messrs. Scovell's clerk in the usual course of business saw Abraham's entry at the Custom House, and thereupon Messrs. Scovell sent lighters and fetched the 277 bales of cotton from the ship's side at the docks to their wharf (Cotton's Wharf), where the cotton was landed and warehoused; and entries were made by the wharfingers in books called by them "Foreign Order Book," and "Landing Ledger," shewing that the cotton had been entered by Abraham on the 2nd of February; that a sampling order had been given in favour of Barber & Co. on the 9th; that the cotton was stopped by the Chartered Bank of India on the 3rd of February, and by the ship-owner for freight on the 7th; and that releases were lodged by the latter on the 7th of March, and by the former on the 6th of May.

8. The landing of the cotton was completed on the 7th of February, 1865; it was not liable to any Customs duty.

9. The master of the ship in due course lodged a stop for freight on the cotton at the wharf, which was not removed till the 7th of March, 1865, when the freight was paid.

10. On the 9th of February, 1865, S. Abraham & Co. instructed the defendants, as their brokers, to sell the 277 bales of cotton in question, and gave the defendants a sampling order on the wharfingers, and requested the defendants to report upon the cotton.

11. The defendants lodged the above order at the wharf, and on the 10th of February got samples of the cotton from the wharf, and on the 11th made a report to Abraham on the cotton.

12. Very shortly after this report, Abraham told the defendants that he should require an advance, and wanted to know whether

they could give him about 4000*l.* against the cotton in question. The defendant Charles Barber told Abraham that he could have 2000*l.* if he liked; but Abraham said that it did not suit him to take it then; he would wait. Before the cotton had arrived, Abraham had asked the defendants if they would advance on the bill of lading, and was told by them that they did not advance on bills of lading, but only on goods on the spot.

13. The plaintiff had known Azémar & Co. for a considerable period, and had been in the habit of having very large transactions with them, and had known Abraham as long as Azémar. After Abraham took up Azémar's business, the plaintiff was in the habit from time to time of making advances to Abraham in the same way as he had done before. In February, 1865, Abraham applied to the plaintiff to advance him 3000*l.* on having security, which the plaintiff agreed to do, and thereupon received from Abraham the following letter:—

"W. Meyerstein, Esq. "London, 10 Feb. 1865.

"Dear Sir,—We beg to hand you herewith B. L. of 28 chests indigo, per *Evadne* £1060

"48 bales of cotton per *Queen of Ava* . . 1090

"F. de Souza acceptance, 24 March . . 1500

£3650

(being drawn against cotton per *Acastus*, value about 7000*l.*, you have a lien on the goods to the above amount, which will be handed to you as soon as realized) against which please accept Messrs. Chatelier & Co's. draft 1500*l.*, due 26th of March, and 1500*l.*, due 19th of April.

"S. Abraham & Co.

"The B. lading per *Queen of Ava* will follow on Monday."

14. On the 10th of February, Abraham indorsed De Souza & Co.'s acceptance to Azémar & Co.'s fourth draft for 1500*l.* (residue of 6000*l.*), and sent it the plaintiff, with the above letter; and the plaintiff also received from Abraham the bill of lading for indigo per *Evadne*, and cotton per *Queen of Ava*, also mentioned in such letter.

15. The plaintiff thereupon accepted Chatelier & Co.'s two drafts for 1500*l.* each, mentioned in such letter, and paid the

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same at maturity thereof, on the 26th of March and 19th of April, 1865.

16. After the 11th of February, 1865, the defendants from time to time made several offers for the cotton per *Acastus* to Abraham & Co.; but the latter did not accept the prices offered. During the week ending Saturday, the 4th of March, 1865, Abraham told Charles Barber, one of the defendants, that he (Abraham) was trying to make arrangements to take up a bill that would be due in a few days, and that he should most likely require the 2000*l.* which the defendants had offered, if they could not give him more.

17. Prior to the 4th of March, 1865, Abraham & Co. paid such of the bills of exchange drawn by F. de Souza & Co. on Azémar & Co. as had become due, the Chartered Mercantile Bank of India retaining all the parts of the bills of lading annexed to the two remaining bills of exchange for (together) 2000*l.*, falling due on the 22nd of March, 1865.

18. Shortly before the 4th of March, 1865, Abraham asked the plaintiff to make him a further advance of 3000*l.*, to meet bills to take up about 300 bales of cotton by two ships, the *Acastus* and the *Wallace*, telling the plaintiff that the cotton would be worth 8000*l.* The plaintiff told him at the time that he had to write over to France, and would try to make an arrangement to make an advance of 2500*l.*, but could not on that day promise to give him an advance, but would do his best. On the next day, Abraham applied again to know whether the plaintiff had made arrangements to make him an advance, as he wanted the money particularly for the 4th. The plaintiff then told him that if he sent down the next morning he could give him a cheque.

19. On the following Saturday (viz. the 4th of March, 1865), Abraham gave his own cheque to the London branch of the Chartered Mercantile Bank of India, for 1995*l.* 11*s.* 3*d.*, in payment of Azémar & Co.'s two remaining acceptances for (together) 2000*l.*, due the 22nd of March (being the amount of those bills less rebate of interest); and thereupon the bank delivered up to Abraham the said three parts of the bill of lading. Abraham on the same day sent the plaintiff one of the said parts of the bill of lading for the cotton per *Acastus*, and one part of a bill of lading for eleven bales of cotton per the *Wallace*, together with F. de

Souza & Co.'s original consignment invoice to Azémar & Co. for the 277 bales of cotton per *Acastus*, and the original Indian consignment invoice for the eleven bales of cotton per *Wallace;* and the plaintiff thereupon, in exchange for such documents, gave Abraham & Co. a cheque for 2500*l.*, which was duly paid.

20. The plaintiff immediately on receiving the bills of lading asked for the second part of the bill of lading, and received the second part of the bill of lading per *Acastus*, and the second part of the bill of lading per *Wallace*, on the 6th or 7th of March. The plaintiff did not ask for the third parts of the bills of lading, believing that such third parts were retained by the captains of the vessels.

21. The defendants were ignorant of all the aforesaid transactions between the plaintiff and Abraham & Co.

22. On Monday, the 6th of March, 1865, Abraham saw Charles Barber, one of the defendants, and said that he should then be glad to take the 2000*l.* against the cotton per *Acastus*. Barber told him that they would not advance at all, unless he agreed to sell the cotton at once, as they had obtained several offers which he had declined, adding that he did not think the market would then bear so much as 2000*l.* advance. He then gave Abraham Barber & Co.'s cheque for 1500*l.*, and told him that they would make a calculation, and, if it would bear 500*l.* more, he should have it the next day. Barber asked Abraham if he had paid the freight, to which Abraham replied that he had not, but that he would do so on the morning of the next day, Tuesday, the 7th of March.

23. On the 7th of March, 1865, the freight was paid, and the stop for freight was removed; and the defendants, having ascertained at the wharf that the goods were freed, gave Abraham on that day another cheque for 500*l.*

24. Both of the defendants' said cheques for 1500*l.* and 500*l.* were duly paid.

25. On the 6th of March, the defendants, in exchange for their cheque for 1500*l.*, received from Abraham the third part of the bill of lading for the cotton per the *Acastus*, indorsed as mentioned in paragraph 4.

26. It was the duty of the defendants' managing clerk, Furness,

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to attend to lodging bills of lading at the wharf under such circumstances; and the defendants' practice was to send on the bills of lading to the wharf at once: but Furness was away ill at this time, and did not return for some time after; and, owing solely to his absence, the bill of lading was not lodged by the defendants at the wharf until the 11th of March, 1865, after the interview between Charles Barber and the plaintiff mentioned in paragraph 31 of the case.

27. On the 9th of March, the defendants sold 100 bales of the 277 bales of cotton per *Acastus* (of which 10 bales were afterwards rejected by the buyers), and on the 10th of March they sold 47 bales more (of which 3 bales were afterwards rejected by the buyers), and on such dates they sent in contracts for the same to S. Abraham & Co., and to the various buyers, with the marks and numbers of the bales stated in the contracts.

28. Subsequently to the 4th of March, 1865, Abraham made an application to the plaintiff for a further advance of 1000*l.* against the cotton.

29. Subsequently to this, Abraham applied to the plaintiff for further advances; and, on the 10th of March, the plaintiff told Abraham that he should be very glad to do so, as he had always promised to make him further advances, provided he was perfectly safe, and his security safe as regards the value; that he would go with Azémar over the securities, and would be the next morning at Abraham's office, and then tell him whether and to what extent he would make him further advances. In consequence of some conversation which the plaintiff had with Azémar, he on the morning of Saturday, the 11th of March, 1865, handed his clerk all the bills of lading, and sent him down to the docks to make inquiries; and he had an interview that morning with Abraham and Azémar at Abraham's office; and, while discussing with them the question of a further advance, the plaintiff's clerk returned, and the plaintiff then learned from him that there was no cotton at the docks. The plaintiff thereupon asked Abraham what had been done with the cotton and those other goods which his clerk said were not at the docks. Abraham at first made no reply. After pressing, Abraham said "The cotton I have sent to Barber's, and the indigo I have sent to Johnson;" but Abraham did not tell the

plaintiff when he had sent the cotton to defendants. Abraham told the plaintiff that he had received advances for the goods from his brokers, the defendants; but he did not say when the advances were made; and the plaintiff thought that they had been made in the ordinary way.

30. The plaintiff thereupon said that he found that he had been robbed to a considerable extent, and insisted upon Abraham giving him some security; and thereupon the plaintiff got from Abraham the following letters:—

"London, 11th March, 1865.

"W. Meyerstein, Esq.

"Dear Sir,—Pursuant to the arrangement between us, we do hereby transfer and make over to you all surplus proceeds which may be coming to us after realization of the under-mentioned goods now in the hands of the under-mentioned brokers, after satisfaction of their claims on the same; such surplus proceeds to be held by you as security for, and, so far as the same may prove sufficient for that purpose, to be applied by you in or towards payment of your advances to or for us, your liabilities, or your current account.

(Signed) "S. Abraham & Co."

[Here followed an enumeration of various bales of cotton and chests of indigo in the hands of Messrs. Andrew Johnson & Co., and of Messrs. Barber.]

"London, 11th March, 1865.

"Messrs. Barber, Nephew, & Co.

Dear Sirs,—We request you will pay over to Mr. W. Meyerstein of this city the surplus net proceeds of the under-mentioned goods, after satisfying the advances you have made us upon the same; and we shall be obliged by your addressing a letter to Mr. W. Meyerstein confirming this.

(Signed) "S. Abraham & Co."

[Here followed an enumeration of various bales of cotton, amongst which were the 277 bales per *Acastus*.]

The goods per *Acastus* were struck out of this letter by the plaintiff, he saying he did not want to have stolen goods transferred to him.

31. The plaintiff thereupon, on the 11th of March, 1865, took the last-mentioned letter to Barber & Co., and gave it to Charles

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Barber, and told him that he had advanced Abraham 2500*l.* on the cotton per *Acastus;* but upon the evidence it was doubtful whether the plaintiff told Charles Barber that the date of the advance by him was previous to the advance by the defendants; the plaintiff saying he did so inform Charles Barber, and Charles Barber stating the contrary.

32. Barber promised to send a reply to the letter, and on the same day wrote the plaintiff as follows:—

"London, 11th March, 1865.

"W. Meyerstein, Esq.

"Dear Sir,—We have this day received a letter from Messrs. Abraham & Co., requesting us to pay over to you the surplus net proceeds of 324 bales cotton as per memorandum at foot, which shall receive our attention in due course.

(Signed) "Barber, Nephew, & Co."

[The memorandum at the foot of this letter mentioned 201 bales per *Cheviot,* 21 per *Queen of India,* and 102 per *Belgravia,* together 324 bales.] The name of the ship *Acastus* was written therein, but struck through.

33. On Monday morning, the 13th of March, 1865, the defendants applied to the wharfingers at Cotton's Wharf for warrants for the 277 bales, and got warrants made out in their (defendants') own names for the same. Previously to obtaining the warrants, the defendants on the 13th of March had given delivery orders to their buyers for a quantity of the cotton, but the goods were not ultimately delivered from the wharf upon such delivery orders, as the warrants were issued in the meantime.

34. On Monday, the 13th of March, 1865, the defendants received from the plaintiff's attorneys notice that he claimed the proceeds of the cotton per *Acastus* and *Wallace;* to which they replied on the same day:—

"We are in receipt of your letter, dated the 11th instant. We know nothing of any such transfer to Mr. Meyerstein as you allege. The eleven bales of cotton per *Wallace* have not been in our hands. On the 277 bales per *Acastus,* we made advances in the ordinary course of business; and the greater part have been sold, and a portion delivered. We cannot waive any of our rights against the cotton or its proceeds."

35. After the 13th of March, 1865, the defendants sold the remainder of the 277 bales per *Acastus*, and sent in contracts for the same, containing the marks and numbers, to Abraham & Co. and to the buyers.

36. The 277 bales of cotton were delivered to the buyers of the cotton to whom the defendants had sold the same. The defendants delivered the warrants, which they had obtained from the wharf, to their buyers, and the cotton was delivered by the wharfingers to the buyers, upon production by the holder of such warrants.

37. The defendants had no notice of the transactions between the plaintiff and Abraham, or of the transactions between De Souza & Co., Azémar & Co., and Abraham & Co., at the time when the defendants made their advances on the 6th and 7th of March, 1865.

38. The defendants had also made advances on the other goods enumerated at the foot of Abraham & Co.'s letter to them of the 11th of March, 1865.

39. The defendant Charles Barber stated that he never advanced till after the arrival of the goods, and that he made no objection to advancing on one part of the bill of lading, without requiring the other parts to be given up.

40. Abraham absconded on discovery of his frauds.

41. On the 14th of March, 1865, the solicitors for Messrs. Smith, Payne, & Smith, wrote to the defendants, as follows:—

"We are instructed by Messrs. Smith, Payne, & Smith, who are holders of the under-mentioned bills, discounted with them by Abraham & Co., to apply to you on the subject of the cotton, which we understand was specially hypothecated to cover those bills, and referred to in them as cotton per *Acastus*.

"It has been represented to Messrs. Smiths that you claim a lien on the cotton in question; and we shall be obliged by your informing us, if this be the case, what it is, and under what circumstances it was acquired.

"Freshfields & Newman.

"Bills for £1500, dated 10th August, 1864, drawn by J. C. Azémar, and accepted by De Souza & Co., and payable six months after sight; ditto, same date, for same sum, drawn and accepted by

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same parties, and payable at like date; ditto, same date, same sum, drawn and accepted as above, and payable as above."

In the month of August, 1865, the acceptors of the bills having failed, the plaintiff made an arrangement with Smith, Payne, & Smith, under which he paid them 1350*l.*, and they gave him up the bills mentioned in that letter, and made over to him all their rights.

42. On the 4th of September, 1865, the defendants made up an account shewing the result of their sales of the various goods in their hands. Such account includes interest on the items on both sides thereof up to the 2nd of September, 1865. [A copy of the account was set out in the case, shewing, amongst other things, the advances made by the defendants on the cotton per *Acastus*, and the sums realized on the sales thereof.]

43. This account was the first intimation that the plaintiff had in any way of the defendants' advances being subsequent to his.

44. On the 20th of November, 1865, the defendants (on other claims being withdrawn) paid to the plaintiff 829*l.* 17*s.* 10*d.*, being the difference between the defendants' advance of 2000*l.*, with interest thereon, and 2848*l.* 18*s.* the proceeds of the 277 bales cotton per *Acastus*, with interest thereon, as shewn upon the account. This amount was paid and received expressly without prejudice to any of the questions in this cause.

45. 2019*l.* 0*s.* 2*d.* is the amount of the difference between the proceeds of the 277 bales cotton, with interest thereon, as shewn by the account, and such sum of 829*l.* 17*s.* 10*d.*

46. Abraham & Co. at the time of the trial were, and still are, indebted to the plaintiff in an amount exceeding 2500*l.*

47. On the above facts, the Chief Justice directed a verdict to be entered for the plaintiff for 2019*l.* and interest (if the Court should think the plaintiff entitled to interest), reserving leave to the defendants to move to enter the verdict for them, the Court to draw any inferences of fact.

48. The defendants thereupon obtained a rule nisi, which was discharged.

The case is reported in Law Rep. 2 C. P. 38, 12 Jur. N. S. 1020

The question for the opinion of the Court was, whether the said rule ought to have been made absolute upon any of the grounds

therein stated. The Court of Appeal to make such rule upon this appeal as it should think fit, and to proceed thereon pursuant to the provisions of the Common Law Procedure Act, 1854.

J. Brown, Q.C. (*Brett, Q.C.*, with him), for the defendants. The question is whether goods landed by the consignee can be transferred whilst in the hands of a wharfinger, by the mere delivery of the bill of lading, as if they were still at sea. The contention on the part of the plaintiff was, that the bill of lading does not cease to represent the goods, or to be transferable, so long as the wharfinger in whose hands the goods are is prohibited by the stop for freight from delivering them to the consignee. The master of the vessel, however, has performed his contract, and is exonerated from all liability in respect of the goods under the bill of lading, the moment the goods are landed by virtue of a perfect entry under the Customs Consolidation Act, 16 & 17 Vict. c. 107, s. 60. The only effect of the Sufferance Wharves Act, 11 & 12 Vict. c. xviii. is, to keep alive the master's lien on the goods for freight.

[BLACKBURN, J. Your argument seems to assume that the wharfinger could have set up the bailment by Abraham against the claim of the Chartered Mercantile Bank. That cannot be.]

No doubt the bank might have demanded the cotton, though warehoused in Abraham's name. When, however, Abraham, on the 4th of March, 1865, paid off the lien of the bank, his right ceased to be that of the holder of a bill of lading, and became simply that of a person having goods in the hands of a warehousekeeper.

[MARTIN, B. Abraham was then in possession of the bill of lading as consignee. The question is whether the pledge to the plaintiff on that day for the advance then made did not pass the property in the cotton to the plaintiff. The 5th section of the 11 & 12 Vict. c. xviii. which prohibits the wharfinger from issuing a warrant whilst the goods are under stop for freight, seems to me to make the matter plain. The freight being satisfied, the bill of lading becomes the representative of the goods, until the wharfinger accepts a delivery order or issues a warrant.]

The bill of lading is at an end and no longer negotiable when the master has delivered the goods to the consignee: and a deli-

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very to a wharfinger named by the consignee is a delivery to the consignee: *Gatliffe* v. *Bourne* (1); Abbott on Shipping, 10th ed. 284; 2 Kent's Commentaries, 699, 10th ed.; Story on Bailments, s. 297.

[LUSH, J. The landing of the goods at the wharf could not operate as a delivery to Abraham, because the bank had then a lien for their advances.]

It is enough to contend that the duty of the master under the bill of lading was at an end as soon as Abraham got possession of that document, he having appointed the wharf. Ever since the case of *Lickbarrow* v. *Mason* (2), by the custom of merchants, an indorsement of the bill of lading has been held to pass the property of goods afloat; and the recent act, 18 & 19 Vict. c. 111, passes the property in the contract as well. But an indorsement of the bill of lading when the goods are on land or in a warehouse is contrary to the custom of merchants.

[BLACKBURN, J. The first difficulty in the defendants' way is, to establish that the wharfinger held the goods at Abraham's disposal.]

1 Q.B.D. 378

In Blackburn on the Contract of Sale, 297, 298, speaking of dock warrants, wharfinger's receipts, and delivery orders, the learned author says: "Those documents are generally written contracts, by which the holder of the indorsed document is rendered the person to whom the holder of the goods is to deliver them, and in so far they greatly resemble bills of lading; but they differ from them in this respect, that, when goods are at sea, the purchaser who takes the bill of lading has done all that is possible in order to take possession of the goods, as there is a physical obstacle to his seeking out the master of the ship, and requiring him to attorn to his rights: but, when the goods are on land, there is no reason why the person who receives a delivery order or dock warrant should not at once lodge it with the bailee, and so take actual or constructive possession of the goods. There is, therefore, a very sufficient reason why the custom of merchants should make the transfer of the bill of lading equivalent to an actual delivery of possession, and yet not give such an effect to the transfer of documents of title to goods on shore."

(1) 4 Bing. N. C. 314. (2) 2 T. R. 63; 1 Smith's L. C. 6th ed. 699.

[BLACKBURN, J. That was published twenty-two years ago, and I have not changed my opinion. But it has no bearing on this question.

BRAMWELL, B. Is not the bill of lading the governing document until some other instrument becomes necessary to get the goods out of the hands of the warehouse-keeper?]

No case has yet held that a transfer of goods on land can be effected by the mere indorsement and delivery of the bill of lading.

[LUSH, J. The handing over the bill of lading for an advance has always been held to be a pledge of the goods.]

Whilst at sea, no doubt; but the question is whether it would have the same effect when the goods are in the warehouse of the consignee.

E. James, Q.C. (Sir *G. Honyman, Q.C.*, with him), for the plaintiff, were not called upon.

The judgment of the Court (Martin, B., Bramwell, B., Channell, B., Blackburn, J., Shee, J., and Pigott, B.) was delivered by

MARTIN, B. We are all clearly of opinion that the judgment of the Court of Common Pleas was right. To my mind the case is perfectly transparent. The facts were these:—Cottons were consigned to Azémar & Co. in London, by merchants in India, who drew bills of exchange against the proceeds, and obtained money thereon from the Chartered Mercantile Bank of India, annexing the bill of lading, and thereby pledging the cotton to the bank for the payment of the bills. The ship having arrived in London with the cotton on board, and it not being convenient to keep it there, an entry was made at the Custom House, under the 16 & 17 Vict. c. 107, by one Abraham, who had succeeded to the business of Azémar & Co., with a direction to land the cotton at Cotton's Wharf, a sufferance wharf in the port of London. The cotton was accordingly landed at the wharf, with a stop thereon, which rendered it subject to the captain's lien for freight, under s. 4 of 11 & 12 Vict. c. xviii. Now, the 5th section enacts that "no such notice as hereinbefore mentioned to detain any goods for payment of freight shall be available unless the same be given or left as hereinbefore provided before the issue by the said wharfinger of the warrant for

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the delivery of the same goods, or an order given by the importer, proprietor, or consignee, or his agent, to, and accepted by, the wharfinger, for the delivery or transfer of the same: but nothing herein contained shall authorize any wharfinger to deliver or issue any warrant or accept any order for the delivery of any goods which shall be subject to a lien for freight, and in respect of which such notice in writing as aforesaid to detain the same for freight shall have been given, until the importer, proprietor, or consignee of such goods shall have produced a withdrawal in writing of the order of stoppage for freight from the owner or master of the ship from or out of which such goods shall have been landed, or his broker or agent, and which order of withdrawal the said master or owner is hereby required to give, on payment or tender of the freight to which the goods shall be liable." For many years past there have been two symbols of property in goods imported: the one, the bill of lading; the other, the wharfinger's certificate or warrant. Until the latter is issued by the wharfinger, the former remains the only symbol of property in the goods. When, therefore, Abraham delivered the bill of lading to the plaintiff on the 4th of March, 1865, as a security for the advance then made to him, such delivery amounted to a valid pledge of the goods, and the plaintiff thereby acquired a right to hold them as against Abraham and all persons claiming title thereto under him. We therefore think the Court below properly held that the plaintiff was entitled to recover.

Judgment affirmed.

Attorneys for plaintiff: *Thomas & Hollams.*
Attorney for defendants: *W. A. Crump.*

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June 21.

[IN THE EXCHEQUER CHAMBER.]

AZÉMAR *v.* CASELLA AND ANOTHER.

Mercantile Contract, Construction of—Sale of Goods "to arrive," guaranteed equal to Sample; Allowance to be made for Inferiority of Quality—*Bulk tendered of a different* Kind.

The defendants, through brokers, bought of the plaintiff "the following cotton, viz. $\frac{D.C.}{C.}$ 128 bales, at 25*d.* per lb., expected to arrive in London per *Cheviot* from Madras. The cotton guaranteed equal to sealed sample in our (the brokers') possession. Should the *quality* prove inferior to the guarantee, a fair allowance to be made." The sample was of "Long-staple Salem" cotton. The 128 bales marked $\frac{D.C.}{C.}$ which arrived by the *Cheviot* contained "Western Madras" cotton. Upon a special case, in which it was stated that there were at the time of the contract different kinds of Madras cotton known in the market, and divided into certain classes and divisions; that the cotton tendered was not "Long-staple Salem," but a particularly good sample of Western Madras; that "the cotton was therefore not in accordance with the sample;" and that "Western Madras cotton is inferior to 'Long-staple Salem,' and requires machinery for its manufacture different to that which is used for 'Long-staple Salem:'"—

Held,—affirming the judgment of the Court of Common Pleas,—that the cotton tendered was not that which the defendants bargained for, and that they were not bound to accept it with an allowance; for that the allowance-clause had reference only to inferiority of *quality*, and not to difference of *kind*.

ERROR upon a decision of the Court of Common Pleas upon a special case, reported antè, p. 431.

Sir G. Honyman, Q.C. (*M'Leod* with him), for the plaintiff. The purpose for which the defendants bought the cotton, which is treated as a material ingredient in the judgment of the Court below, ought not to be considered in construing the written contract: the real question is, whether the sale was made subject to a condition that the bulk on arrival should be (as the sample was) Long-staple Salem, or whether the words "guaranteed equal to sealed sample" amounted only to a collateral engagement or warranty. The sale was of a specific number of bales; and the breach of the warranty, it is submitted, did not justify the defendants in rejecting them, but only entitled them to a reduction of price, or to bring a cross-action. Whether or not the property passes by the contract is wholly immaterial, where the purchase is of specific goods.

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[BLACKBURN, J. If the thing does not answer the description of that which is sold, the buyer is not bound to take it; and, if he has paid for it, he may recover back the money as upon a failure of consideration: *Gompertz* v. *Bartlett* (1); *Gurney* v. *Womersley*. (2)]

There was no such difference of description here. The sample and the bulk were both Madras cottons. Formerly it was held that, if a horse were sold with a warranty as to age or soundness, and it turned out that his age was untruly represented or that he was unsound, the buyer might return the horse and sue for the price paid. Now, however, it is held that he must resort to a cross-action for the breach of warranty.

[MARTIN, B. That was settled by *Street* v. *Blay*. (3) But, suppose a horse (a racer) was sold as a yearling, and he turned out to be two years old, could it be said that the purchaser got that which he bought?]

In *Gattorno* v. *Adams* (4), the plaintiff agreed to sell to the defendant a specific cargo of wheat, described in the bought and sold-note as shipped on board a particular vessel, "as per bill of lading dated September or October;" and it was held that the buyer was not entitled to rescind the contract, on its turning out that all the wheat had not been shipped before the bill of lading was given. *Heyworth* v. *Hutchinson* (5) is not to be distinguished from the present case. The defendant bought of the plaintiffs, at a price named, "413 bales of wool, to arrive ex *Stige*, or any vessel they may be transhipped in; the wool to be guaranteed about similar to samples in the selling brokers' possession; and, if any dispute arises, it shall be decided by the selling brokers, whose decision shall be final." On the arrival of the wool, it turned out not about equal to sample, and the brokers, after protest from the defendant, awarded that he should take it at a certain abatement in the price for different bales; and it was held that, as the contract was for the sale of specific goods, the guarantee was not a condition, but only a warranty; that the defendant could not reject the wool on account of its inferiority; that the brokers had

(1) 2 E. & B. 849; 23 L. J. (Q. B.) 65.
(2) 4 E. & B. 133; 24 L. J. (Q. B.) 46.
(3) 2 B. & Ad. 456.
(4) 12 C. B. (N.S.) 560.
(5) Law Rep. 2 Q. B. 447.

power to award as they had done; and that the defendant was bound to take the wool accordingly.

[BLACKBURN, J. That is quite consistent with the decision in this case. The wool which arrived was of the same kind or character as that contracted for, but inferior only in quality.]

So here, the cotton tendered was cotton answering the description of that sold, except that it differed in quality from the sample. The language of the contract must be looked at to see whether the words "warranted equal to sealed sample,"—without which there would be no ground for the argument of the defendants,—were intended to be descriptive of the thing sold, or a mere collateral guarantee: *Behn* v. *Burness*. (1) It will be said that the allowance-clause is confined to difference of quality, and does not extend to difference in kind; but, why should the same word receive a different construction in the one case from that which it would receive in the other? As regards quality, the words clearly could not amount to a condition.

[MARTIN, B. The language of Lord Abinger, in delivering judgment in *Chanter* v. *Hopkins* (2), seems to me to be conclusive. "A good deal of confusion," he says, "has arisen in many of the cases on this subject, from the unfortunate use made of the word 'warranty.' Two things have been confounded together. A warranty is an express or implied statement of something which the party undertakes shall be part of a contract; and, though part of the contract, yet collateral to the express object of it. But, in many of the cases, the circumstance of a party selling a particular thing by its proper description, has been called a warranty, and the breach of such a contract a breach of warranty. But it would be better to distinguish such cases as a non-compliance with a contract which a party has engaged to fulfil; as, if a man offers to buy *peas* of another, and he sends him *beans*, he does not perform his contract; but that is not a warranty; there is no *warranty* that he should sell him peas; the contract is to sell peas, and, if he sends him anything else in their stead, it is a non-performance of it." I have always considered that to be as sound an exposition of the law as can be. Here, the contract is for 128 bales of a particular kind of cotton known as Long-staple Salem. If the bulk should turn out to be an

(1) 3 B. & S. 751; 32 L. J. (Q.B.) 204.

(2) 4 M. & W. 399, 404.

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inferior *quality* of Long-staple Salem, the buyer is to have an allowance. But he is entitled to have cotton of the *kind* he contracted to buy.]

That is introducing into the contract words which are not found there. In *Nichol* v. *Godts* (1); *Josling* v. *Kingsford* (2); and *Wieler* v. *Schilizzi* (3), the article tendered was not at all within the description of the article sold. Here it is.

J. Brown, Q.C. (*Hannen* with him), was not called upon.

The judgment of the Court (Martin, B., Blackburn, J., Channell and Pigott, B.B., and Shee, J.) was delivered by

MARTIN, B. We are all of opinion that the judgment of the Court of Common Pleas is right, and must be affirmed. This was a sale of Madras cotton. It is stated in the case, that there were at the time of the contract different kinds of Madras cotton known in the market, and divided into Tinnevelly, Northern and Western Coconada, and Coimbatore, and Salem, each of which was compared with a standard sample, and divided into different divisions, under the terms "ordinary," "low middling," "middling fair," "good fair," and "fine," which were sold at different prices; that the cotton tendered was not "Long-staple Salem," but was a particularly good sample of Western Madras, and that "the cotton was therefore not in accordance with the sample;" and that "Western Madras cotton is inferior to 'Long-staple Salem,' and requires machinery for its manufacture different to that which is used for 'Long-staple Salem.'" On the date of the contract, the plaintiff sold to the defendants 128 bales of cotton marked $\frac{\text{D. C.}}{\text{C.}}$, at 25*d.* per lb., expected to arrive in London, per *Cheviot*, from Madras, guaranteed equal to sealed sample in the brokers' possession; the contract containing a stipulation that, should the *quality* prove inferior to the guarantee, a fair allowance was to be made. The quantity of cotton described did arrive by the *Cheviot*. The sample by which it was sold was "Long-staple Salem," one of the denominations before mentioned; but, when the cotton arrived, it turned out to be Western Madras, which is a different species of

(1) 10 Ex. 191; 23 L. J. (Ex.) 314.
(2) 13 C. B. (N.S.) 447; 32 L. J. (C.P.) 94.
(3) 17 C. B. 619.

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cotton altogether. It was contended on the part of the plaintiff that the defendants were nevertheless bound to accept the cotton which arrived as a fulfilment of the contract. We think they were not. The sale was of "Long-staple Salem," according to sample. The guarantee is that the bulk should be of the same kind or description of cotton, under the denomination of "ordinary," "middling fair," "fine," &c. We are very clearly of opinion that the judgment of the Court below is right, that the foundation of the contract was that the cotton should be "Long-staple Salem," and that, as it turned out to be something different, the defendants had a right to reject it altogether.

Judgment affirmed.

Attorneys for plaintiff: *Thomas & Hollams.*
Attorney for defendants: *W. A. Crump.*

YEOMAN *v.* ELLISON.

June 28.

Landlord and Tenant—Contract of Tenancy—Right to distrain.

An agreement for the sale of a public-house contained the following stipulation:—"And, inasmuch as it is intended that E. (the purchaser) shall be let into immediate possession of the hereditaments hereby agreed to be sold, and for the purpose of securing the due performance of the several agreements herein contained, he the said E. hereby admits himself to be a tenant from week to week to S. (the vendor) of the hereditaments hereby agreed to be sold, at the weekly rent of 80*l.*, payable in advance:"—

Held, that this created the relation of landlord and tenant between S. and E., and gave a right to distrain.

TROVER for hay. At the trial before the judge of the county court of Yorkshire holden at Skipton, it was proved on the part of the plaintiff that one Robert Sharp was on the 23rd of August 1865, the owner of certain lands and tenements called the Red Lion Inn, at Burnsall, in the county of York; and that on that day Sharp, by his agent John Birkbeck, contracted to sell the Red Lion Inn and premises to the defendant, and a memorandum to the following effect was signed by Birkbeck on behalf of Sharp, and by the defendant:—

"Memorandum of an agreement made &c. between R. Sharp, of Burnsall, innkeeper, for himself, his heirs, executors, and adminis-

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trators, of the one part, and J. C. Ellison, of Bradford, manufacturer, for himself, his heirs &c., of the other part, whereby Sharp agrees to sell and Ellison agrees to purchase, upon the terms hereinafter mentioned, all that inn or public-house called the Red Lion Inn, situate at Burnsall aforesaid, with the outbuildings and land thereto belonging, as then occupied by Sharp. . . .

The purchase-money for the said hereditaments shall be the sum of 1575*l.*, and shall be payable and paid as follows, that is to say, the sum of 75*l.* on the signature hereof, and the balance or sum of 1500*l.*, with 5 per cent. interest, on the 7th of March next. . . .

And, inasmuch as it is intended that Ellison shall be let into immediate possession of the hereditaments hereby agreed to be sold, and for the purpose of securing the due performance of the several agreements herein contained, he the said J. C. Ellison hereby admits himself to be a tenant from week to week to Sharp of the hereditaments hereby agreed to be sold, at the weekly rent of 80*l.*, payable in advance."

The defendant entered into the possession of the Red Lion Inn and premises under the agreement, and paid to Sharp the 75*l.* agreed to be paid by him on the signing of the agreement, but none of the payments of 80*l.* per week were made. Sharp failed to make a good title to the premises, but the defendant continued in the possession and occupation of the Red Lion Inn and lands, and was still at the time of entering the plaint in possession thereof; on the 25th of November, 1865, Sharp, by writing signed by him, authorized one Craig to distrain the goods on the premises for 400*l.* for rent and arrears of rent due on the 24th of November then last for the occupation of the premises; and by virtue of that authority, Craig on the 25th of November, 1865, distrained and impounded the goods of the defendant on the premises.

No replevin-bond had been entered into; and on the 30th of November and 1st of December, the goods and chattels on the premises (including the hay, damages for the conversion of which the plaintiff claims) were duly appraised, and were sold by auction on the 1st of December, 1865, and realized, after payment of expenses, 295*l.* 8*s.* 7*d.*

The plaintiff purchased the hay in question for 21*l.* 15*s.*, and

paid that sum to the distrainor's agent; and the hay was demanded by the plaintiff, but the defendant refused to allow him to carry it away, and appropriated a considerable portion of it to his own use.

No witnesses were called for the defendant; but it was argued on his behalf that the memorandum of agreement of the 23rd of August, 1865, being accompanied by immediate possession, amounted in law to a lease, and as such ought to have been upon a lease stamp, whereas it had only an agreement stamp affixed, and was not therefore receivable in evidence. The judge, thinking that it was not intended to create the relation of landlord and tenant, allowed it to be given in evidence.

The defendant thereupon argued that, if not a lease, Sharp had no right to distrain, the agreement containing no power to do so. In this view the judge concurred, being of opinion that the so-called weekly rent reserved by the agreement was not rent-service, nor a rent-charge, nor rent-seck, but merely a penalty for securing the due performance of the agreement.

The question for the opinion of the Court was, whether the memorandum of the 23rd of August, 1865, gave Sharp a right of distress. If the Court should answer this question in the affirmative, the verdict for the defendant was to be set aside and a verdict entered for the plaintiff for the amount sought to be recovered; otherwise, the verdict entered for the defendant was to stand.

Feb. 6. *T. Jones, Q.C.*, for the plaintiff. The last clause of the agreement clearly gave Sharp a right to distrain for arrears of the weekly rent.

[WILLES, J. At all events it would operate as a licence: *Pollitt* v. *Forrest*. (1) I do not see why a tenancy should not be created between the parties.]

Walker v. *Giles* (2), which seems to be an authority the other way, was virtually overruled by *Pinhorn* v. *Souster*. (3) That which creates the right to distrain is put in Bac. Abr. Leases and Terms for Years (K) in almost the very words which are used in this document. As between Sharp and Ellison a tenancy from

(1) 11 Q. B. 949.
(2) 6 C. B. 662.
(3) 8 Exch. 138, 763; 22 L. J. (Ex.) 18, 266.

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week to week was intended to be created: and Sharp would clearly have had a right to distrain for the rent, or to maintain an action. If an action had been brought, it is difficult to see what answer Ellison could have had. It is true, he might have had a remedy in equity to recover back the money paid, in the event of the purchase going off for defect of title. But the dry question here is, whether or not a rent-service could be created by the terms used.

The defendant did not appear.

Cur. adv. vult.

June 28. The judgment of the Court (Willes and Keating, JJ.) was delivered by

WILLES, J. We have arrived at the conclusion that the opinion of the county court judge cannot be reconciled with the terms of the contract. The judge seems to have thought the reservation of the weekly rent was of a penal character: but we know of no rule of law by which the amount agreed on by the parties can be reduced on that account.

Judgment for the plaintiff.

Attorney for plaintiff: *H. T. Naters, for H. Robinson, Settle.*

Applied. EVERETT v. RIBBANDS [1952] 1 K.B. 112

May 14.

BASEBÉ *v.* MATTHEWS AND WIFE.

Malicious Prosecution, Action for—Summary Conviction, without Appeal.

9 Q B 75

The rule that, in an action for maliciously and without reasonable or probable cause putting the law in motion to the plaintiff's damage, it is essential to aver that the proceeding alleged to have been instituted maliciously and without reasonable or probable cause, has terminated in favour of the plaintiff, if from its nature it be capable of such a termination, applies to a case in which the plaintiff has been summarily convicted under a statute giving no power of appeal.

THE declaration stated that the defendant Ellen falsely and maliciously, and without reasonable and probable cause, appeared before a justice of the peace, and charged the plaintiff with assaulting and beating her, contrary to the statute, and by false, scandalous, and malicious statements then made by the said Ellen before the

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justice, and without any reasonable and probable cause, caused the justice wrongfully to convict the plaintiff of the supposed offence, and to adjudge that he should pay a fine of 40*s.*, and 1*l.* 5*s.* 6*d.* for costs, which said fine and costs the plaintiff was compelled to pay, *there being no appeal from the said conviction;* and that, by reason of the premises, the plaintiff had been injured in his reputation, and put to expense, &c.

Demurrer, on the ground that no action lies for a malicious prosecution, unless the prosecution has failed. Joinder.

Berresford appeared to support the demurrer; but the Court called upon

C. C. Wood to support the declaration. The declaration charges that this person by false and malicious statements induced the magistrates to convict the plaintiff of an assault, and that he had no power to appeal against the conviction; and that is admitted by the demurrer. In no case yet has such a declaration been held not to be sufficient. In *Mellor* v. *Baddeley* (1), there was an opportunity of appealing; and this is relied on by the Court in giving judgment. "The conviction under 1 & 2 Wm. 4, c. 32, being summary, s. 44 gives to the party convicted an appeal from it to the quarter sessions, provided he gives the complainant a notice in writing within three days after such conviction, and shall also either remain in custody till the sessions, or within such three days enter into a recognizance to appear and try such appeal. The plaintiff in this case neither gave notice of appeal nor entered into such recognizance, but suffered the punishment awarded on the conviction. Therefore, as he acquiesced in it, that was evidence of probable cause." *Whitworth* v. *Hall* (2) was decided upon the same principle.

[BYLES, J. In the ordinary case of an indictment there is no appeal, except a point be reserved.

KEATING, J., referred to *Gilding* v. *Eyre* (3), where, in an action for wrongfully and maliciously and without reasonable and probable cause procuring the arrest of the plaintiff for a larger sum than was due upon the judgment, it was held not to be necessary for the plaintiff to allege that he had obtained his discharge by

(1) 2 C. & M. 675, 678; 4 Tyrw. 962, 966. (2) 2 B. & Ad. 695.
(3) 10 C. B. (N.S.) 592; 31 L. J. (C.P.) 174.

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order of a judge, so as to shew that the proceedings had terminated in his favour.]

In *Churchill* v. *Siggers* (1), which was a similar action, Lord Campbell, C.J., says: "To put into force the process of the law maliciously and without any reasonable or probable cause is wrongful; and, if thereby another is prejudiced in property or person, there is that conjunction of injury and loss, which is the foundation of an action on the case. Process of execution on a judgment seeking to obtain satisfaction for the sum recovered is primâ facie lawful; and the creditor cannot be rendered liable to an action, the debtor merely alleging and proving that the judgment had been partly satisfied and that execution was sued out for a larger sum than remained due upon the judgment. *Without malice and the want of probable cause,* the only remedy for the judgment debtor is to apply to the Court or a judge that he may be discharged, and that satisfaction may be entered upon payment of the balance justly due. But it would not be creditable to our jurisprudence if the debtor had no remedy by action when his person or his goods have been taken in execution for a larger sum than remained due on the judgment, this having been done by the creditor maliciously and without reasonable or probable cause; *i. e.* the creditor well knowing that the sum for which execution is sued out is excessive, and his motive being to oppress and injure the debtor." That reasoning is precisely applicable here. In *Fitzjohn* v. *Mackinder* (2) the opinion of Willes, J., is strong to shew that, if the proceeding be malicious and false, so that the conviction is obtained by means of a fraud upon the Court, the mere fact of its remaining unreversed, the plaintiff having no means of calling it in question, will not be held conclusive evidence of probable cause. The observations of the judges in *Steward* v. *Gromett* (3) are also strongly in favour of the view now presented. Williams, J., says: "In the case of the exhibiting of articles of the peace,—which it seems to me is strictly analogous to the less formal proceeding before the magistrates out of sessions,—the authorities shew that the matter could not terminate in favour of the plaintiff, because he is not at liberty to

(1) 3 E. & B. 929, 937; 23 L. J. (Q.B.) 308.

(2) 8 C. B. (N.S.) 78; 29 L. J. (C.P.) 167. In error, 9 C. B. (N.S.) 505.

(3) 7 C. B. (N.S.) 191, 206; 29 L. J. (C.P.) 170, 175.

controvert the statement made against him; and therefore it is impossible to say that the existence of the proceedings, and the fact that they have not terminated favourably to the plaintiff, is any evidence that there was reasonable or probable cause for instituting them." In *Venafra* v. *Johnson* (1) there was no allegation that the conviction had been set aside.

[MONTAGUE SMITH, J. In the notes to *Ashby* v. *White*, in 1 Smith's Leading Cases, 6th ed. 258, it is said that "an unreversed judgment raises a necessary presumption that the proceedings to obtain it were instituted with reasonable and probable cause."]

Berresford referred to the judgment of Erle, C.J., in *Barber* v. *Lesiter* (2), as being quite conclusive of the question.

BYLES, J. I think we should be disturbing foundations if we were to admit that there is any doubt that the criminal proceeding must be determined in favour of the accused before he can maintain an action for a malicious prosecution. If this were not so, almost every case would have to be tried over again upon its merits. In my judgment it makes no difference that the party convicted has no power of appealing. This doctrine is as old as the case of *Vanderberg* v. *Blake* (3), where Hale, C.J., says, that, "if such an action should be allowed,"—that is, an action against a custom-house officer for seizing goods, which were afterwards condemned as forfeited by judgment of the proper court,—"the judgment would be blowed off by a side-wind."

KEATING, J. I am entirely of the same opinion.

MONTAGUE SMITH, J. I am of the same opinion. In *Castrique* v. *Behrens* (4), which was an action for conspiring with certain persons fraudulently and unlawfully to procure an attachment and condemnation of a ship by a proceeding in rem in a foreign court, Crompton, J., in delivering the judgment of the Court, says: "There is no doubt, on principle, and on the authorities, that an action lies for maliciously and without reasonable and probable cause, setting the law of this country in motion to the damage of

(1) 10 Bing. 301.
(2) 7 C. B. (N.S.) 175; 29 L. J. (C.P.) 161.
(3) Hardr. 194.
(4) 3 E. & E. 709, 721; 30 L. J. (Q.B.) 163, 168.

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the plaintiff, though not for a mere conspiracy to do so, without actual legal damage: *Cotterell* v. *Jones* (1); *Barber* v. *Lesiter*. (2) But, in such an action, it is essential to shew that the proceeding alleged to be instituted maliciously and without probable cause has terminated in favour of the plaintiff, if from its nature it be capable of such termination. The reason seems to be, that, if in the proceeding complained of the decision was against the plaintiff, and was still unreversed, it would not be consistent with the principles on which law is administered for another court, not being a court of appeal, to hold that the decision was come to without reasonable and probable cause." The only ground upon which Mr. Wood has attempted to distinguish this case from the current of authorities is, that here the plaintiff had no opportunity of appealing against the conviction. If we yielded to his argument, we should be constituting ourselves a court of appeal in a matter in which the legislature has thought fit to declare that there shall be no appeal. It was intended that the decision of the magistrate in a case of this sort should be final. It cannot be impeached in an action.

Judgment for the defendants.

Attorneys for plaintiff: *Merriman & Buckland.*
Attorneys for defendants: *Lewis & Lewis.*

July 8.

THE FREE FISHERS OF WHITSTABLE *v.* FOREMAN.

Anchorage-due, what will sustain a Claim for—Prescription.

A claim for anchorage-dues on a navigable arm of the sea cannot be supported in respect of the mere ownership of the soil. Such a claim, in the absence of evidence to shew that the place is within the limits of a port or haven, requires some consideration of advantage to the public to sustain it.

But, if such a claim be presumably capable of a legal origin, and the payment of dues is shewn to have been uninterruptedly received time out of mind, every intendment will be made in its favour.

An oyster-fishery had been possessed and an anchorage-due had been claimed and received from time immemorial by the lords of the manor of Whitstable in respect of all vessels casting anchor within the limits of certain anchorage-ground within the manor. In 1795, the fishery and the soil thereof (including the

(1) 11 C. B. 713. (2) 7 C. B. (N.S.) 175; 29 L. J. (C.P.) 161.

anchorage-ground) were conveyed by the lord, with all its rights and appurtenances, to the plaintiffs, who thenceforth claimed and received the anchorage-due. There was some evidence that Whitstable was a limb of the port of Sandwich; but there was no direct evidence to shew that the anchorage-ground was within or connected with the port, or that the franchise of the port was ever granted out by the Crown. There was, however, evidence that the lord of the manor was the owner of a landing-place called Le Craston, within the limits of the manor, and that he took toll upon merchandize landed there, and also that he was owner of the anchorage-ground, and took the anchorage-due as such lord and owner of the soil. The recitals in an act of parliament, by which the plaintiffs were incorporated and impowered to purchase the manor and manorial rights, stated that there were "customary payments usually and of right made to the lord of the manor for or in respect of any ship or vessel on the landing of goods or merchandize within the said manor." There was also evidence that the plaintiffs had as far back as living memory extended maintained buoys and beacons, which served the double purpose of pointing out the channel by which vessels of small burthen might safely reach the anchorage-ground, and also of protecting the oyster-beds :—

Held, that the maintenance of the buoys and beacons, taken in connection with the ownership of the soil of the anchorage-ground, and the benefit to the public therefrom, afforded a sufficient consideration to support the plaintiffs' claim to the anchorage-due.

Affd in Ex Ch 3 C.B. 578 Affd 4 H.L. 266

THE declaration stated that the defendant was indebted to the plaintiffs for the anchorage, groundage, and other tolls and charges for and in respect of divers vessels before then brought and anchored by the defendant, and for money due and owing and of right payable in respect thereof, and for money due on accounts stated.

Plea, never indebted. Issue thereon.

The following case was stated under a judge's order by consent for the opinion of the Court:—

1. The plaintiffs are the Company of Free Fishers and Dredgers of Whitstable, in the county of Kent, incorporated by act of parliament, 33 Geo. 3, c. 42 (1793), a copy of which act accompanied and was to form part of the case. (1) They are the owners in fee

(1) This act, which is printed among the public acts, recites "that there hath time out of mind been an oyster-fishery within the limits of the manor and royalty of Whitstable, in the county of Kent, extending from the sea-beach a very considerable distance into the sea, which fishery hath all that time been managed and carried on by and at the expense of a certain company of free dredgers, called The Whitstable Company of Dredgers, who have held the same time out of mind as tenants under the lord of the said manor and royalty, on payment of a certain annual rent;" and that "the good order and government of the said fishery is of great public concern, and it would much tend to the carrying on and good management thereof, if the said company were allowed

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of the ground situate within the sea limits of the manor of Whitstable, and hereinafter described as the anchorage-ground.

2. The defendant is the owner of a vessel called the *Sancho Panza*, a collier trading to Whitstable.

3. The action was brought to recover 3*s.*, being three anchorage tolls of 1*s.* each, claimed by the plaintiffs as toll for the defendant's vessel, *Sancho Panza*, on her casting anchor at Whitstable on three separate occasions, viz. on the 14th of September, 31st of October, and 27th of November, 1860. The ground on which the *Sancho Panza* brought up and anchored on the 14th of September and 31st of October was within the anchorage-ground somewhat below ordinary low-water mark. Where the vessel anchored on the 27th of November was between high and low-water mark, but upon ground which had been conveyed by the plaintiffs to the South Eastern Railway Company in the year 1828, and upon which a harbour had been constructed, hereinafter described as "the railway company's harbour."

4. The position of the anchorage-ground and of the railway company's harbour was described in a map annexed to the case.

5. The anchorage-ground abuts north on certain land and ground belonging to the manor of Faversham, and is divided therefrom in part by certain grass banks and a bank of shingle and stone called "the Redge;" south on the sea-beach at Whitstable aforesaid; east on certain natural banks of shingle and stones commonly

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to purchase the said manor and royalty of Whitstable, or such part thereof as would be convenient for the better regulation of the said fishery." It then recites that Thomas Foord had purchased of the lord of the said manor and royalty "the said royalty of fishing or oyster-dredging, and the ground and soil of the said fishery, from the south and south-east sides of the said sea-beach at Whitstable, as the same is and hereafter shall be thrown up by the sea from time to time, and the sea-beach, and all the lands and grounds from thence into the sea as far as the said fishery extends, and also the customary payments usually and of right made to the lord of the said manor for or on account of any ship or vessel, or the landing of goods or merchandize within the said manor," &c.; and that "the said company are willing to purchase the royalty of the said fishery, but they are disabled to do so because doubts have arisen whether the said company be a corporation in law, notwithstanding it has existed time out of mind, and likewise on account of the statutes of mortmain." It then proceeds to incorporate the company, and impowers them to make the proposed purchase.

known as "the Strette," extending from the said sea-beach up to the said "Redge," which bank known as "the Strette" dries at four hours ebb of the sea; and west on the mainland of the county of Kent and the island of Sheppy. The said land or ground is situate in the mouth of the East Swale, and between the mainland of Kent and the island of Sheppy. The railway company's harbour stands on the coast in the position indicated in the plan.

6. The plaintiffs and those under whom they claim have from time immemorial continually down to the present time taken the sum of 1s. from every vessel casting anchor within the limits of the anchorage-ground now in their possession, whether the anchoring were voluntary or from necessity. Since 1828 the plaintiffs' company have not demanded any anchorage from any vessels sailing into and anchoring within the railway company's harbour, unless such vessels have previously cast anchor on their anchorage-ground.

7. The plaintiffs' collector gave receipts for anchorage in the following form:—

"For the manor and royalty of Whitstable, in the county of Kent.

"Received of captain of the for anchorage and groundage on the said manor, one shilling.

"A. B.

"Bailiff and collector."

8. The anchorage-ground at Whitstable is safe in blowing weather, owing to its being sheltered on the north-west and west sides by the island of Sheppy and the mainland of Kent, and to its being further protected by the "Strette" and "Redge," which are natural breakwaters, and cause the sea to break at half-ebb.

9. The plaintiffs are the owners of oyster-beds which lie to the north and east of the anchorage-ground at Whitstable. The limits of the plaintiffs' oyster-beds on the north of the anchorage-ground are indicated by lines of poles; and the western boundary of the oyster-beds on the east is indicated by a line of buoys and beacons which are maintained by the plaintiffs' company. The anchorage-ground is inclosed by the oyster-beds on the north and east; and, as all vessels anchoring take the ground at low-water, the poles, buoys, and beacons indicate where a vessel may anchor without the risk of grounding upon and injuring the plaintiffs' oyster-beds. There are

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no buoys or beacons to indicate the anchorage-ground, except those maintained by the plaintiffs.

10. The plaintiffs also keep two boats which are called "watch-boats," and are usually moored, one on the northern boundary of the oyster-beds to the north, and the other on the western boundary of the oyster-beds to the east of the anchorage-ground. They are maintained for the protection of the plaintiffs' oysters from thieves, and also to warn vessels from attempting to come to the anchorage-ground when from the state of the tide they would be likely to ground upon and injure the oysters. Since the year 1858, these watch-boats have been provided with lights. The light on the outer boat is put out when there is less than thirteen feet of water where the boat is moored, and the light on the inner boat when there is less than seven feet of water at the moorings. These boats are compelled to leave their moorings in very rough weather.

11. Vessels sailing into the anchorage-ground at night derive some aid from the lights in the watch-boats, but are chiefly guided by a light on shore from the railway company's harbour. The ordinary course of navigation for vessels intending to make the anchorage at Whitstable is, to sail along the "Redge" until the light in the harbour bears south, and then to steer straight in. There is another mode of entering the anchorage-ground, through a channel called "the Eddy Hole," which lies between the "Strette" and the "Redge." The buoys which indicate the limits of the plaintiffs' oyster-beds also point out this channel. It is a safe channel for fishing-boats and vessels of small draught of water; but it is unsafe and not ordinarily used for loaded vessels.

12. The light exhibited on shore is maintained by the South Eastern Railway Company in the harbour constructed by them on the land purchased from the plaintiffs in 1828. The light is always shewn, and affords the most valuable aid to vessels endeavouring to make the anchorage-ground. The members of the plaintiffs' company are forbidden by their bye-laws to dredge or work, and they do not in fact dredge or work, on their oyster-beds after dark.

13. For some years before 1816, no light was exhibited from

the shore at Whitstable, and in consequence the anchorage-ground was frequently missed by vessels endeavouring to find it. In the year 1816, a man named Reeves, who filled the position of foreman to the plaintiffs' company, exhibited a light from a mast erected on his premises. The expense of the light was borne by a contribution from the plaintiffs' company and the ship-owners of Whitstable. The company paid 10*l.* per annum, and the ship-owners 5*s.* for each vessel. This contribution was made voluntarily, and was never demanded as a right by Reeves or by the plaintiffs' company. The light was continued down to the year 1828, when, in consequence of the unsatisfactory manner in which the light was maintained by Reeves, the contributions ceased, and the light was for some time altogether discontinued.

14. In the year 1832, a man named Perkins, who was not in the employ of the plaintiffs' company, but was a sail-maker residing at Whitstable, exhibited a light from a window in his sail-loft; and the expense was borne as before, by contributions, of the same amount as those formerly paid, from the plaintiffs' company and the ship-owners.

15. In the year 1838, a man named Richards, who was not in the employ of the plaintiffs' company, succeeded Perkins in the management of the light. He removed it from its former position to a pole in front of his house. The expense continued to be borne, as before, by voluntary contributions; but the light ceased to be exhibited with regularity about the year 1845.

16. In the year 1848, a person named George Clay, who was then in the employment of the South Eastern Railway Company as master of their harbour at Whitstable, proposed to the plaintiffs' company and to the ship-owners of Whitstable to exhibit a light from the railway company's harbour, upon being paid 6*l.* a year by the plaintiffs' company and tonnage of $\frac{1}{4}d.$ a ton upon vessels using the said harbour. To this arrangement the plaintiffs' company and the ship-owners agreed. The plaintiffs' company discontinued their payments after two years; but the tonnage-dues have been regularly paid to the South Eastern Railway Company, and the light has been constantly exhibited.

17. The only proofs of any payment by the plaintiffs' company towards maintaining a light prior to the year 1816, are

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the following entries in the books of the company by a former treasurer:—

"1777. June 29. Paid Mr. Mathew Brown three pounds three shillings for one year's use of the light £3 3 0

"1778. May 12. Paid Mathew Brown four pounds four shillings for one year's use of the light . 4 4 0"

18. The buoys and beacons maintained by the plaintiffs' company have been so maintained during living memory. The books kept by the former treasurer of the plaintiffs' company contain amongst others the following entries with reference to the buoys:—

"1773. Sept. 5. Paid Mr. A. Jatson for 28 lbs. of lead to run in the stones for the use of the buoys, and his time 5*s.* 8*d.* . . . £0 5 8

"Paid Mr. T. Turner for a cable to lay with the buoys 1½ cwt. 0 7 6

"1774. Feb. 3. Paid for advertising the buoys in the Kentish Gazette 0 7 0

"Paid for advertising in St. James's Chronicle, Post, and twice in the Chelmsford papers . 0 16 6

"1775. April 8. Paid Mr. C. Rich 4*l.* 10*s.* for three can buoys 4 10 0

"1776. Nov. 9. Paid myself 4*s.* for writing the boards out to put upon the buoys . . 0 4 0"

19. The only advertisements inserted in the Kentish Gazette about the date of the above entry were two which appeared in the papers of Dec. 15th and Dec. 18th, 1773, and were as follows:—

"Whitstable, December, 1773.

"Notice is hereby given that the Company of Free Fishers and Dredgers of the manor and royalty of Whitstable, in the county of Kent, have lately put up and placed down buoys to mark out and distinguish the boundaries of the said manor and royalty; and that every person who shall hereafter trespass upon the said free fishery and royalty by dredging for or taking oysters, or do any damage to the said buoys belonging to the said free fishers and dredgers, will be prosecuted for the same," &c.

20. The manor of Whitstable, antiently known as Northwood, was a subinfeudation of the barony of Chilham, and in the survey

of Domesday is found in the possession of Odo, Bishop of Bayeux.

21. A few years afterwards the barony of Chilham, with its members, was granted to his tenant Fulbert, who took the surname of de Dover. It continued in the possession of his family until the reign of Hen. 3, when by an inquisition taken on the death of Richard and Roesia de Dover, they were found to have held of the king in chief the said barony of Chilham, and, amongst others of its members, the manor of Northwood, worth yearly in all issues 21*l.* 1*s.* Richard de Dover, their son, dying without issue, the manor of Northwood descended to John Earl of Athol, son of his sister Isabel: but the possession of it accrued to her second husband, Alexander de Balliol, who held it by courtesy during his life.

22. During his tenancy of the manor, at the circuit of and before the justices in eyre for Kent, in the 7 Edw. 1 assigned to hold pleas of quo warranto, Alexander de Balliol, in right of Isabel his wife, claimed to have the liberties under-written without charter of old custom in his manor in the county, to wit, at Whitstable, viz. "a free hundred court, &c., wreck of the sea, *toll*, and warren; and that they and all the ancestors of the same Isabel, from time whereof memory is not, have fully used all these liberties." An inquisition being prayed, the knights chosen on the jury returned a verdict that the said Alexander, Isabel, and her ancestors, had immemorially and fully used the said liberties, and had usurped nothing upon the Crown. Judgment was therefore given for the claimant.

23. At the circuit of the justices in eyre for Kent, in the 21 Edw. 1, upon an information quo warranto, the said de Balliol was summoned to answer to the king on a plea by what warrant he claimed to hold pleas of the Crown, and to have free-warren, market, fair, *toll*, gallows, wreck of the sea, and waif, in Chilham, Hathfeldes, Kingston, and Ridlingwold, &c., by two writs. In his answers, the said Alexander by his attorney said that he held the manor of Whitstable and the hundred of Whitstable by the law of England of the inheritance of John Earl of Athol, by reason of which he claimed to have in the same hundred in which the aforesaid manor is, view of frankpledge, amendment of the assize

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of bread and ale broken, infang thief, and gallows, and waifs; and John by his attorney came, and he joined himself with the aforesaid Alexander in his answer; and they said that besides the aforesaid liberties they claimed in the aforesaid manor free-warren and wreck of the sea, and *toll with merchandize at le Craston* (Greystones), *in the same manor;* and they said that the aforesaid Alexander and the ancestors of him the said John, from the time whereof memory is not, have had the aforesaid hundred and the aforesaid liberties to the same hundred pertaining, and in the aforesaid manor, warren, and wreck, and *toll*, without interruption; and of this they put themselves upon the country.

24. The jurors said upon their oath that the aforesaid Alexander and the ancestors of the aforesaid John have always from time whereof memory is not had all the liberties aforesaid as they claimed to have the same, except free-warren in the lands newly acquired, which before the purchase were not of the manors aforesaid, in which acquired lands they ought not to have warren: therefore the said newly acquired lands should remain diswarrened, and Alexander and John as to the other liberties should go thereof without day, saving the king's right, &c.

25. The manor of Whitstable, having escheated to the Crown, was soon afterwards granted to Bartholomew de Badlesmere and Margaret his wife for their lives, who in the 5 Edw. 2 (A.D. 1309) petitioned for a grant of it (inter alia) in fee, by way of exchange for other manors, with the king. By letters-patent in the same year this manor, amongst others, was granted to the said Bartholomew and Margaret in fee, to hold with all the liberties and free customs to the same appertaining.

26. The lands of Bartholomew de Badlesmere having become forfeited by attainder, they were granted in the following year to David de Strabolgi, Earl of Athol, for life.

27. During the tenancy of the manor by this earl, a commission by letters-patent of the 3rd January, 19 Edw. 2, was issued to William de Gray and John de Shelmyng, whereby the king,—reciting that he had ordered that a strict search should be made in the several ports of the kingdom, respecting all letters brought from or carried into foreign parts, so that all of a dangerous or suspicious character might be transmitted to him for inspection;

and that he had been informed that many of the bearers of such letters, in order to escape such search, had landed in vessels along the coast of the Thames between Reculver, *Greystones*, and Whitstable, and had thence carried letters inland,—directed the said commissioners to guard the coast between the aforesaid vills, and make strict search in all and singular places where ships ply or may ply by the aforesaid coast between the aforesaid vills, and arrest the bearers of such letters as aforesaid. Commissions in the same form are then directed to various persons, including Roger de Langdon and Hugh de Bermondsey, respecting the custody of all places by the coast of the Thames in the several ports and places from *Greystones* unto Faversham; Henry Underwood and William de Condieshall, respecting all the ports and places by the sea-coast in the ports and places between Reculver and Greystones; and Thomas Dodde, respecting all places by the sea-coast between the vills of Whitstable and Faversham.

28. A proclamation was also on the 14th of August, 20 Edw. 2, addressed to Ralph Basset, Constable of Dover and Warden of the Cinque Ports, respecting the secret introduction of treasonable-letters by foreign merchants coming into the said ports under colour of grants of safe-conduct, and directing him to prohibit such a practice in all the ports aforesaid, and other places where vessels arrive, and disclaiming any intention that those deputed to make search in the aforesaid ports and places should cease to do so on account of any grants of safe-conduct having been made. A writ in the same form is then directed to William de Gray and John de Shelmyng, the commissioners assigned to search along the coast of the Thames between Reculver, *Greystones*, and Whitstable, disclaiming in like manner any intention that they should cease to search "in the ports and places aforesaid," by reason of such grants of safe-conduct.

29. Upon the death of David Earl of Athol, in the 1 Edw. 3, his possessions reverted to the Crown, and were granted in the following year to Giles, son of Bartholomew de Badlesmere, in fee.

30. Upon a partition of the estates of Giles de Badlesmere among his sisters and coheirs, this manor was assigned to the share of Maud, wife of John de Vere, Earl of Oxford.

31. In the 17 Edw. 2, the reversion of this manor after the

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death of the said Maud, Countess of Oxford, the tenant for life, was granted by letters-patent to Thomas Duke of Gloucester in fee, who by royal licence in the same year settled it as part of the indowment of the College of Plecy, in Essex.

32. During the tenancy of the manor by this religious house, an award was made on the 1st of May, in the 4 Hen. 7 (A.D. 1489), by Sir William Haute, Knight, and others appointed by the Lord Chancellor and others lords of the king's great council to be arbitrators in a dispute which had arisen between the tenants and inhabitants of Milton near Sittingbourne and the College of Plecy, lords of the manor of Whitstable, as to the dredging of oysters within the ground, stream, and shallow called "the Grace," within the said manor of Whitstable. The award sets forth that the said arbitrators, being impowered to inquire into the title and right of the parties respectively, to take a view of the said stream, ground, and shallow where the said oysters breed, and determine the said dispute, summoned the parties before a special jury of the county of Kent; and, after a full hearing of the case, and a view taken of the locus in quo, found that "the said ground, shallow, and stream as it is bounded and lies from the king's deep channel called Redepe unto the mainland, and between the ground of the Archbishop of Canterbury and the Abbot of St. Augustine, Canterbury, and the Prior of Christchurch, is parcel of the said manor of Whitstable, and several to the same."

33. In a rental of the manor of Whitstable made by a survey of a jury of tenants of the manor in the 22 Hen. 8, among the holdings enumerated are divers fisheries called weirs held under certain yearly rents. The localities of these weirs are described as being five of them at the Strette, six of them at the Regge, and one fishery at the Beken. The Strette and the Regge are the banks which lie on the east and north of the anchorage-ground.

34. The estates of the College of Plecy came into the hands of the Crown upon the dissolution of the religious houses. The manor of Whitstable was granted by letters-patent of the 31st of December, 38 Hen. 8 (A.D. 1540), amongst others, to John Gates, under the following description: "And also all those our manors of Whitstable and Buckingfeld, with all and singular their rights, members, and appurtenances, in the county of Kent, to the said

late college some time belonging and pertaining, and lately being parcel of the possessions thereof; and all that our rectory," &c.; "and all and singular other messuages," &c. &c., "fairs, marts, markets, *tolls,* customs, free-warrens, &c., situate, lying, and being in Plesce Magna, &c., and in Whitstable and Buckingfeld, in our county of Kent."

35. On the attainder of Sir John Gates in the first year of Mary, his possessions escheated to the Crown. The minister's accounts of them rendered to the Exchequer returned the manor under the name of Whitstable, anciently called Norwood, and now called St. Anne's and Courtlees, as then in lease, with all marshes, fisheries, *royalties,* and other appurtenances thereof, to W. Selherst, for forty-nine years, at the rent of 30*l.* 13*s.* 4*d.*

36. By letters-patent of the 27th of February, 2 & 3 Ph. & M., it was granted to Anne Duchess of Somerset for life, with all marshes, waters, fishings, rights, *franchises,* &c., thereto belonging in Whitstable, within the said manor.

37. In the 7 Eliz. a special commission was directed out of the Court of Exchequer, to Sir T. Cotton and other commissioners, to survey the port of Sandwich, and the number and condition of its creeks or members to certify which of them were the most frequented by merchants, and were fit to be continued for the receipt of customs, &c. The certificate of the commissioners thereupon returned enumerates among the members or creeks of Sandwich, "Whitstable, ten miles distant from the said port, towards the north." It proceeds to state the condition of the various members, among which Dover and Faversham are declared to be in decay, and "all the residue to be in good estate." The commissioners thus conclude: "All the creeks above named, other than such as have officers attendant, do sometimes receive in and deliver out wares and merchandize, but none meet to have continuance but only the said port of Sandwich and the creeks of Dover, Faversham, Milton, and Rochester. Nevertheless, for the ease of the county it is thought meet that the creeks aforesaid as well within the Isle of Thanet as elsewhere be maintained and used for the transporting of corn, wood, and other commodities out of one part of the realm into another part, making their entries and taking cokets and making certificate to the next port or creek adjoining,

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where the said officers are resiant; and the said several creeks as to the transporting of merchandize to or from beyond the sea to be utterly damned."

38. Dover, mentioned in the said inquisition, is now and from time immemorial has been one of the Cinque Ports. Faversham, also mentioned in the said inquisition, is and from time immemorial has been a port, and is a limb of Dover.

39. In the 6 Eliz. the Queen, by letters-patent of the 20th of March, granted the reversion of the manor of Whitstable after the death of the Duchess of Somerset, with, amongst other things, its rights and appurtenances, under the following description, to Thomas Heneage, Moyle Finch, and Michael Heneage, in fee, and all and all manner of fairs, markets, courts of repondre, free-warren, wrecks of the sea, &c., tolls, customs, and all other liberties, franchises, &c., in Thorndon, Myldinghall, Burston, Eltinghall, Hurne, Whitstable, &c., and in every or any of them, to the said manor, &c., by these presents granted or to any of them belonging, or which hereafter may come, happen, or arise in the same manors, &c.

40. The interest of the three grantees became vested in Thomas Heneage.

41. In the 23rd of Elizabeth, he, having obtained the Royal license to do so, alienated the said manor to Thomas Smith, who in the 34 Eliz. died seised of it, which thereupon descended and came to John Smith, his son, and subsequently to Thomas Smith, his grandson, who in 1628 was created Viscount Strangford. Philip Viscount Strangford, his grandson, died seised of the manor of Whitstable, having by his will devised it to his daughter Catherine, the wife of Henry Roper, Lord Teynham, who aliened the manor to Sir Henry Furnese, of Waldershare, Bart.

42. Sir Henry Furnese died seised of the manor of Whitstable, having by his will, dated the 28th of September, 1709, given and devised all his manors, lands, &c., chargeable as therein mentioned, to his son Robert, afterwards Sir Robert, and the heirs of his body begotten or to be begotten. Sir Robert Furnese suffered a recovery as of Trinity Term, 13 Ann., to bar the entail created by his father's will.

43. By indentures of lease and release, dated the 6th and 7th of

July, 1714, the manor of Whitstable, in the county of Kent, and also all quit-rents, rents of assize, courts-leet, courts-baron, fines, amerciaments, felons' goods, waifs, estrays, deodands, oyster-grounds, fisheries, wrecks of the sea, *royalties, franchises,* &c., and all other the waste-grounds, salt-marshes, &c., with their appurtenances, to the said manor belonging or appertaining,—all which said manor, &c., are therein mentioned to have been formerly purchased by Sir Henry Furnese of Henry Lord Teynham and G. Sayer, Esq.,—were conveyed to the several uses therein mentioned.

44. Lord Bolingbroke, being then seised of the manor, by deed of deputation dated the 13th of November, 1775, directs his water-bailiff, Jasper Rowden, to collect *anchorage,* &c., from vessels arriving and anchoring on the manor of Whitstable. The deputation was set out: it impowered him "to ask and demand and receive of all masters of vessels who shall anchor within my said manors *terrage* for every vessel as shall be under the burthen of 100 tons the sum of 1*s.*, and after that rate for every vessel of a larger burthen," &c.

45. By indentures of lease and release, dated the 11th and 12th of October, 1791, all that the manor of Whitstable, with all and singular the rights, royalties, privileges, members, and appurtenances thereof, in the said county of Kent, were conveyed to Edward Foad and Thomas Smith, in equal moieties, as tenants in common in fee-simple.

46. By lease and release, dated respectively the 24th and 25th of October, 1792,—reciting that within the limits of the said manor of Whitstable there was, and for many hundred years then last past had been, a fishery for the growth and improvement of oysters, extending from the sea-beach for a very considerable distance into the sea, and which fishery during all that time had been managed and carried on by and at the expense of a certain company of free dredgers called "The Whitstable Company of Dredgers," who had held the same from time to time as tenants under the lord of the manor, and claimed to be entitled to hold the same as free fishers on payment of such annual rents as were thereinafter mentioned; that it had been contracted and agreed by and between the parties to those presents that, for the several considerations thereinafter mentioned, a division should be made in the rights of the said

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manor, royalty, fishery, hereditaments, and premises; and that the said manor, and all the lands, &c., and manor rights belonging thereto (except as thereinafter was mentioned), should be the property of E. Foad, J. Nutt, and S. Salisbury, their heirs and assigns; and that all the rights of the lord of the said manor in the said fishery and the ground and soil thereof from the south and south-east sides of the sea-beach (which from time to time had been considered as the land boundaries of the fishery), and in the customary payments usually made to the lord of the manor for or on account of the *anchorage* of any ship or vessel, or for the landing of any goods or merchandize, or for the admission of freemen, or other payments for the regulation of the freemen and fishery, and all other payments whatsoever at the water-court of free dredgers there within the jurisdiction of the said manor, and all other such like payments, and all forfeitures, articles, and things which of right belonged to and were the property of the lord of the manor by reason of any wrecks of the sea or such like rights and forfeitures arising within the limits of the said sea-beach, should be the property of Thomas Foord, his heirs and assigns,—all that the said manor, and the said messuages, land, quit-rents, rights, royalties, liberties, &c., and all and singular other the premises thereby or mentioned or intended to be thereby granted and released, with their and every of their appurtenances (save and except the said royalty of fishery or oyster-dredging, and the right of taking oysters and other fish within the said manor, and the ground and soil of the said fishery, and also the customary payments usually and of right made to the lord of the said manor for or on account of the anchorage of any ship or vessel, or for the landing of merchandize within the manor, or for the admission of freemen, or other payments for the regulation of the freemen and fishery there, and all other payments whatsoever at the water-court of free dredgers there, and all such like payments, and all and all manner of forfeitures, articles, and things which of right belong unto and are the property of the lord of the said manor by reason of any wrecks of the sea, or other such like rights and forfeitures arising within the limits of the sea-beach aforesaid), were limited as to one-third to Edward Foad in fee, as to one other third to J. Nutt in fee, and as to the remaining third to S. Salis-

bury in fee; And all the said royalty of fishery or oyster-dredging and the right of taking oysters and other fish within the said manor, and the ground and soil of the said fishery, extending as thereinafter was mentioned, and also the customary payments usually and of right made to the lord of the said manor for or on account of the anchorage of any ship or vessel, or the landing of any goods or merchandize within the manor, or for the admission of freemen, or other payments for the regulation of the freemen and fishery there, and all other payments whatsoever at the water-court of free dredgers there, and all such like payments, and all and all manner of forfeitures, articles, and things which of right belong unto and are the property of the lord of the said manor by reason of any wrecks of the sea, or other such like rights and forfeitures arising within the limits of the sea-beach aforesaid, and all remedies for the recovery of the said premises respectively, were limited to the said Thomas Foord in fee. The release also contained a power of attorney from Foad, Nutt, and Salisbury, to enable Foord to receive the customary payments or anchorage-dues, &c.

47. Thomas Foord, by deed of deputation dated the 30th of November, 1792, directs his water-bailiff to collect anchorage of vessels arriving and anchoring on the manor of Whitstable.

48. By act of parliament of 33 Geo. 3, c. 42, The Whitstable Company of Dredgers were incorporated, and enabled to purchase the manor of Whitstable of Thomas Foord.

49. By indentures of lease and release dated respectively the 4th and 5th of June, 1795, made between Thomas Foord of the one part, and The Company of Free Fishers and Dredgers of Whitstable in the county of Kent, then lately incorporated by act of parliament, of the other part, all that the royalty of fishery or oyster-dredging, and the right of taking oysters and other fish within the manor of Whitstable, and the ground and soil of the said fishery, extending as thereinbefore was mentioned, and also the customary payments usually and of right made to the lord of the said manor for or on account of the *anchorage* of any ship or vessel, or the landing of goods or merchandize within the said manor, or for the admission of freemen, or other payments for the regulation of the freemen and fishery there, and all other payments

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whatsoever at the water-court of free dredgers there, and all such like payments, and all and all manner of forfeitures, articles, and things which of right belonged unto and were the property of the lord of the said manor by reason of any wrecks of the sea, or other such like rights and forfeitures arising within the limits of the sea-beach aforesaid, were conveyed unto and to the use of the said Company of Free Fishers and Dredgers, and their successors for ever.

50. Since the conveyance to the plaintiffs, they have received, by their water-bailiff, anchorage upon all vessels casting anchor within the limits of the anchorage-ground within the said manor, and within the boundaries aforesaid.

The question for the opinion of the Court is, whether the plaintiffs are entitled to recover the said anchorage-tolls, or any and which of them, from the defendant. Should the Court be of opinion that the plaintiffs are entitled to recover, judgment is to be entered for the plaintiffs for such of the tolls claimed as the Court may direct, with costs of suit. Should the Court be of opinion that the plaintiffs are not entitled to any of the tolls claimed, judgment of nonsuit is to be entered, with costs of suit.

Mellish, Q.C. (with him *Denman, Q.C.*, and *Raymond*), for the plaintiffs. The right claimed by the plaintiffs in this case has already undergone considerable discussion in *The Free Fishers of Whitstable* v. *Gann*. (1) In this Court and in the Exchequer Chamber the claim was sustained by reason of the plaintiffs' ownership of the anchorage-ground. The House of Lords, however, decided that mere ownership of the soil was not sufficient to legalize a claim for anchorage-dues in a place not shewn to be within or belonging to a port, and being covered by the sea at high-water, where all persons would have a right to navigate, and, as incident to such right, to cast anchor; and that, inasmuch as the right of navigating on the sea and of anchoring was a right common to all the Queen's subjects, and one of which they could not be deprived without an adequate consideration, the claim must

9 Jur. N.S. 1241

(1) 11 C. B. (N.S.) 387; 31 L. J. (C.P.) 372: in Ex. Ch. 13 C. B. (N.S.) 853; 32 L. J. (C.P.) 194: in House of Lords, 11 H. L. 192; 20 C. B. (N.S.) 1.

be founded on proof that the soil of the claimant was originally within the precincts of a port or harbour, or that some service or aid to navigation was rendered by the owner of the soil who claimed the anchorage-due. "To make a grant of anchorage," said Lord Wensleydale (1), "in an arm of the sea, where the fundus maris is the property of the Crown, but where every subject of the Crown has a right to navigate, and to cast anchor when and where he thinks fit, as a necessary means of safe navigation, he cannot be deprived of that right by a usage however long, unless there is some evidence of a sufficient consideration, of some advantage to the subject, to enable the Crown to confer upon a particular individual the privilege of receiving compensation from the subject, and thus depriving the subject of his undoubted right. On this record it appears to me that there is not sufficient evidence of any such facts." The question is whether the facts now stated supply that defect, and shew a sufficient consideration for the plaintiffs' claim. Any facts from which the Court can consistently draw the conclusion that there may have been a consideration for the immemorial payment, will entitle the plaintiffs to recover. The result of the evidence set forth in the case is, that, long before the time of legal memory, the soil of the fishery was granted to the lord of the manor of Whitstable; that from time immemorial there had been an anchorage-ground there, where vessels came not only for safety but for the purpose of landing goods at Le Craston or Greystones on payment of a toll (whether it was a customable port where foreign goods might be landed may be doubtful); and that buoys and lights for guiding vessels to the anchorage-ground were kept up, and it may be also for the protection of the oyster-beds. This is abundant consideration for a grant which the Court will presume from the immemorial payments.

[BOVILL, C.J. It seems to me to be material for the plaintiffs to shew that Whitstable was a port or haven.]

This appears from a commission and return of the 7 Eliz., referred to in par. 37 of the case. (2) Hale, de Portibus Maris, Part 2, c. 2, p. 46, exactly describes this sort of port or haven.

(1) 11 H. L. at p. 210; 20 C. B. (N.S.) 16.

(2) A full copy of this commission and return was by consent handed to the Court. The effect of it is stated in the judgment.

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He says: "A port is an haven, and somewhat more. First, it is a place for arriving and unlading of ships or vessels. Second, it hath a superinduction of a civil signature upon it, somewhat of franchise and privilege, as shall be shewn. Third, it hath a ville, or city, or borough, that is the caput portus, for the receipt of mariners and merchants, and the securing and vending of their goods and victualling their ships. So that a port is quid aggregatum, consisting of somewhat that is natural, viz. an access of the sea whereby ships may conveniently come, safe situation against winds where they may safely lye, and a good shore where they may well unlade; something that is artificial, as keys, and wharves, and cranes, and warehouses and houses of common receipt; and something that is civil, viz. privileges and franchises, viz. jus applicandi, jus mercati, and divers other additaments given to it by civil authority." In c. 6, p. 72, he divides the ownership of a port into "ownership of propriety," and "ownership of franchise." "The ownership of propriety," he says, is, "where the king or common person by charter or prescription is the owner of the soil of a creek or haven where ships may safely arrive and come to the shore. This interest of propriety may, as hath been shewn, belong to a subject. But he hath not thereby the franchise of a port; neither can he so use or employ it, unless he hath that liberty time out of mind or by the king's charter. Indeed, he may bring thither for his own private use his own boats and vessels to carry off and bring in his own goods that are not customable, as fish, &c.; but he may not use it as a public port, or admit foreigners, unless in case of necessity, nor take toll or anchorage there; for, that is fineable, either by presentment, or in a quo warranto. The ownership of franchise is that which gives the formality or denomination of a public or lawful port, and becomes a free arrival of ships to lade and unlade their goods and merchandizes; and this may be acquired by prescription, or by creation by the king either by proclamation or by charter." At p. 74, "anchorage" in a port is said to be "a prestation or toll for every anchor cast there; and sometimes though there be no anchor. And this doth in truth properly and primâ facie arise from or in respect of the propriety of the soil, and is an evidence of it. But yet it is not so always, but grows due in respect of the franchise; for, many times, where the shore of a

harbour belongs to a private lord or owner, yet if at full sea a ship lets fall an anchor upon that place, the king or lord of that port in point of franchise hath usually the anchorage." There is abundant evidence here that the plaintiffs as owners of the manor had the franchise of a port, and a right to the anchorage-dues, and sufficient consideration is shewn to support their claim.

Prentice, Q.C. (*F. M. White* with him), for the defendant. That which is in derogation of the public rights cannot be claimed by prescription: *Mayor of Nottingham* v. *Lambert.* (1) Neither could a charter or grant of this kind be sustained without adequate consideration. In Com. Dig. Prærogative (D. 48), it is said: "The king cannot charge the subject with an imposition, where he has no benefit by it, or a quid pro quo;" citing 2 Rol. Abr. 272, l. 40; 2 Inst. 220. As to the buoys and beacons, which are relied on as the consideration on which to base a presumed grant, they were erected by the company in 1773, which was before the conveyance of the manor to them; and they were erected, not for the advantage of the public, but to warn vessels to avoid anchoring on the oyster beds. In *The Mayor of Colchester* v. *Brooke* (2), it was held that a claim to an oyster-fishery must be subservient to the rights of the public. The alleged claim for toll for landing goods at Greystones has no relation whatever to the claim for anchorage. In *Warren* v. *Prideaux* (3), a prescription to have a bushel of salt of every ship that comes laden with salt within a certain port, in consideration of maintaining *the quay* and keeping a bushel to measure the salt, was held to be bad: and Hale, C. J., said: "The prescription is not for *a port* but *a wharf.* If any man will prescribe for a toll upon the sea, he must allege a good consideration; because by Magna Charta, and other statutes, every one hath a liberty to go and come upon the sea without impediment. . . . If he had said that he had a port, and was bound to maintain that port, and that he and all those whose estate he had, &c., that might have been a good prescription. But in this case there must be a special inducement and compensation to the subject, by reason of those statutes by which all merchants and others have liberty to come in and go out." In Com. Dig. Toll (C), it is said: "Toll

(1) Willes, 111. (2) 7 Q. B. 339.
(3) 1 Mod. 105; 2 Lev. 96; 1 Freem. 355.

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cannot be claimed from those to whom the consideration does not extend; as, a custom that, upon consideration that the city of N. maintains a quay for all goods imported upon the river to the city, they ought to take for every ship upon the river passing by the quay so much, is not good for ships which do not load or unload at the quay:" *Haspurt* v. *Wills.* (1) In a note upon that case in Bac. Customs (D), referring to Sid. 454, it is said that "there would have been some reason for it, if it had appeared that they cleansed the river." The maintaining a quay, therefore, clearly is no consideration for a claim for anchorage. From the statement in the case, what is called the anchorage-ground is a mere natural formation. It does not appear that the plaintiffs or any person under whom they claim have done anything to repair or maintain it. It is now said that Whitstable was a limb of the port of Sandwich: on the former occasion it was claimed to be a limb of Faversham; and this is observed upon by Lord Chelmsford in his judgment. (2)

[BOVILL, C.J. It would appear to have been a limb of Sandwich for fiscal purposes.]

In none of the deeds referred to in the case is there any mention of Whitstable being a port having the ordinary incidents of a port: all the conveyances treat it as a manor, with its appurtenances. The burthen of proof is on the plaintiffs: the Court cannot upon the evidence before them assume it to be a port which any one is bound to repair, so as to form a consideration for an anchorage-toll; as in *Vinkinson* v. *Ebden.* (3) There is no suggestion here that the plaintiffs are under any liability to repair.

[KEATING, J. If any liability to repair existed, it is reasonable to expect that the return to the commission in 7 Eliz. would have said something about it.]

In Hale, de Portibus Maris, Part 2, c. 2, p. 47, it is said "a creek is of two kinds, viz. creeks of the sea, and creeks of ports. The former are such little inlets of the sea, whether within the precinct or extent of a port or without, which are narrow little passages, and have shore of either side of them. The latter, viz. creeks of ports, are by a kind of civil denomination such. They are such

(1) 1 Vent. 71; 1 Mod. 47. (2) 11 H. L. at pp. 216, 217.
(3) Carth. 357; 5 Mod. 359; 1 Salk. 248.

that, though possibly for their extent and position they might be ports, yet they are either members of or dependant upon other ports. And it began thus:—The king could not conveniently have a customer and comptroller in every port or haven. But these custom-officers were fixed at some eminent port; and the smaller adjacent ports became by that means creeks or appendants of that where these custom-officers were placed." Hale then gives a list of several ports with their limbs or members. Among them, Deal, Ramsgate, Margate, and Milton, are mentioned as limbs of Sandwich, and Rochester and Queenborough as limbs of Faversham. Whitstable is not named at all.

[BOVILL, C.J. Lord Hale is there speaking of ports with reference to fiscal regulations, not of the Cinque Ports and their members.]

Such a right as that here set up clearly cannot be claimed by custom: and even a charter from the Crown would not sustain it without consideration. In par. 22, the claim of Alexander de Balliol is expressly stated to be "without charter of old custom."

[BOVILL, C.J. Without charter produced. The whole context shews a claim by prescription.]

The "toll" there referred to is not *anchorage*, but fair or market-tolls, or others which might lawfully be taken in the manor. The first time that any mention is made of "anchorage" is in the deed of deputation executed by Lord Bolingbroke, and mentioned in par. 44.

[BOVILL, C.J. And that is said to be, not for anchoring in the port, but "on the manor of Whitstable."]

Nowhere is there to be found any claim in respect of a legal port or haven, but merely in respect of the ownership of the manor. The act of parliament of 1793 is equally silent in respect of this claim. That which Foord is recited to have purchased of the lord of the manor, and which he professed to convey to the Fishery Company, is, "the said royalty of fishing or oyster-dredging, and the ground and soil of the said fishery (describing it), and also the customary payments usually and of right made to the lord of the said manor for or on account of any ship or vessel, or the landing of goods or merchandize within the said manor." The deeds of 1792 and 1795, it is true, do make mention of anchorage; but there is nothing to warrant the claim.

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Mellish, Q.C., in reply, conceded that the plaintiffs were bound to shew some evidence of consideration to sustain the grant relied on: and he submitted that the facts set out in the case sufficiently shewed that Whitstable was a "port," or a limb of a port, that the anchorage-ground in question was part of the port, and that, if necessary, the maintenance of the buoys and beacons, and the giving up of part of his soil by the owner of the manor for a landing-place at Le Craston or Greystones, was a sufficient consideration for the claim of anchorage; relying especially upon the quo warranto in 21 Edw. 1, mentioned in par. 23, the special commission in 19 Edw. 2, mentioned in par. 27, and the inquisition in 7 Eliz., referred to in par. 37.

[MONTAGUE SMITH, J. No mention is made of a port or haven in any of the conveyances. Would it pass by a grant of "the manor, with its appurtenances?" Free-warren would not.

WILLES, J., referred to *Morris* v. *Dimes*. (1)]

A right of anchorage may well be claimed, like all other royal franchises, as appurtenant to a manor. The evidence to sustain the claim is much stronger than that which prevailed in *The Mayor, &c. of Exeter* v. *Warren*. (2) He also referred to *The Earl of Falmouth* v. *George* (3), where the maintenance of a capstan and rope for hauling vessels on to the beach, was held to be a sufficient consideration for a claim of toll.

Cur. adv. vult.

July 8th. The judgment of the Court (Bovill, C.J., Willes, J., Keating, J., and Montague Smith, J.) was delivered by

BOVILL, C.J. The right claimed by the plaintiffs in this case is similar to that which was in question in the case of *The Free Fishers of Whitstable* v. *Gann*, viz. the right to an anchorage-due from all vessels casting anchor on certain land covered by the sea, called the anchorage-ground, near Whitstable, in the county of Kent.

In the former case, the right was sought to be maintained by reason of the plaintiffs' ownership of the soil upon which the anchors were cast; and it was supported on that ground by this

(1) 1 Ad. & E. 654; 3 Nev. & M. 671. (2) 5 Q. B. 773.
(3) 5 Bing. 286.

Court (1), and afterwards in error, by the Exchequer Chamber. (2) The House of Lords, however (3), decided that, the anchorage-ground not being shewn to be within or belonging to a port, and being under a part of the sea where all persons would have a right to navigate, and, as incidental to such right of navigation, of casting anchor, the right claimed by the plaintiffs could not be supported in respect of the mere ownership of the soil: and it was decided that such a right required some consideration of advantage to the public in order to support it.

The plaintiffs' case being on that occasion based upon the ownership of the soil, their evidence had been directed to that point alone. No facts appeared from which the claim could be supported upon any other grounds; and the ultimate decision upon the then statement of their case was adverse to the plaintiffs.

The present case is brought before us in a different form. The claim is not now based upon the mere ownership of the soil of the anchorage-ground; and we are called upon to decide whether, under the circumstances set forth in this special case, the plaintiffs have established their right to the payment in question.

No claim is made in respect of that part of the anchorage-ground which has been taken by the South Eastern Railway Company; nor was any distinction made in the arguments between that part which is above and that which is below the ordinary low-water mark: and, indeed, as the public would have an equal right of navigation over both, no real distinction could properly be made.

Upon the present statement of the facts, it appears that the payment of the anchorage-due now claimed has been made and received from time immemorial in respect of all vessels casting anchor within the limits of the anchorage-ground.

The anchorage-ground appears to have been within and parcel of the antient manor of Whitstable; and there are oyster-beds on the outside of the anchorage-ground. Both belonged to the lord as part of the manor; and, upon the statements in the case, and from the recitals in the act of parliament of 1793, both must be taken to have existed from time immemorial. There was also in

(1) 11 C. B. (N.S.) 387; 31 L. J. (C.P.) 372.
(2) 13 C. B. (N.S.) 853; 32 L. J. (C.P.) 194.
(3) 11 H. L. C. 192; 20 C. B. (N.S.) 1.

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antient times a place within the manor for the unloading of merchandize: and from the record of the quo warranto in the 21 Edw. 1, it clearly appears that the lord of the manor of Whitstable was entitled to toll with merchandize at Le Craston (or Greystones), within the manor: and, although the precise locality of Le Craston is not now known, yet from the commission of 19 Edw. 2, and the proclamation of the 20 Edw. 2, referred to in paragraphs 27 and 28 of the case, it would seem to have been somewhere upon the coast between Reculver and Whitstable.

There is also a reference in the act of parliament of 1793 to "the customary payments usually and of right made to the lord of the manor for or on account of any ship or vessel on the landing of goods or merchandize within the said manor."

By the commission and return of the 7 Eliz. (of which a full copy has been furnished to us by consent, and which is to be considered part of the special case), it further appears that at that time Whitstable was a port, in the sense of being a member or creek of the port of Sandwich. It had not any officers of customs; but it was a place for receiving in and delivering out wares and merchandize. The Royal commissioners returned that it should be discontinued, or, in their words, "utterly damned," as a place for transporting wares or merchandize to or from beyond the seas. At the same time they thought it meet that "it (with other similar members or creeks of the same port of Sandwich) should be maintained and used for transporting wares and merchandize out of one part of the realm into another part, making their entries, and taking cokets, and making certificate to the next port or creek adjoining where the customs officers be resiant."

There can be little doubt, therefore, that in very early times there was in fact a port at Whitstable for the lading and unlading of ships; and the present anchorage-ground, adjoining the shore, and being protected from storms, would no doubt be frequented by vessels coming to the port, as a safe and convenient place of anchorage close to if not within the limits of the port. There is no direct evidence, however, to shew that the anchorage-ground was within or connected with the port, or that the franchise of the port was ever granted out by the Crown. The evidence seems strongly to shew that the lord was the owner of the landing-place

at Le Craston, and took toll upon merchandize there; and that he was also the owner of the anchorage-ground, and took the anchorage-due as such lord and owner of the soil.

The old anchorage-ground, before the sale to the South Eastern Railway Company, was protected to the north and east, on the sides exposed to the sea, by banks partly grass, and partly shingle and stones, which banks were known by the names of "The Redge," and "The Strette:" and it extended on the other sides to the sea-beach and the mainland, which protected it on those sides,—thus affording a comparatively safe anchorage for ships.

There appear to have been fisheries belonging to the manor, at "The Redge," and "the Strette," as far back as the 22 Hen. 8 (see par. 33 of the case), and the oyster-beds to the north and east of the anchorage-ground: and these fisheries and oyster-beds now belong to the plaintiffs.

The plaintiffs are the owners of the soil of the anchorage-ground, and vessels anchoring there take the ground at low-water. The plaintiffs also maintain poles, buoys, and beacons to mark the boundaries of the oyster-fishery, and to prevent vessels anchoring and grounding upon the oyster-beds: but these poles, buoys, and beacons also mark the position of the banks and the limits of the anchorage-ground, and indicate the channel for entering it through the Eddy Hole, and thus enable vessels to avoid the shoal-banks by which the anchorage-ground is protected, and point out the channel by which vessels of a light draught of water can enter the anchorage-ground. These buoys and beacons have been maintained as far back as living memory extends.

Some stress was laid by the defendant upon the fact of the free fishers having maintained the buoys before they became entitled to the fishery and anchorage-ground: but little weight can be attached to this circumstance, because, according to the recital in the act of parliament, they had carried on and managed the fishery as tenants under the lord of the manor long before they became the purchasers of it.

The public navigating the sea, and especially those resorting to Whitstable, may therefore have the use of the soil belonging to the plaintiffs for the purpose of casting anchor and afterwards of grounding upon it as the tide falls. The access or channel to the

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anchorage-ground through the Eddy Hole and the banks which protect it, is pointed out by the buoys and beacons which are maintained by the plaintiffs at their expense, and which also serve to protect vessels from grounding upon and injuring the oyster-beds belonging to the plaintiffs; and vessels can remain there protected by the banks from the storms of the sea in comparative safety, and in a place convenient to the port.

There was also some proof of lights having been maintained at various periods; but this was not much pressed in the argument; and, from the time and circumstances at and under which these lights have been kept up, they do not in our opinion materially assist the case of the plaintiffs.

There is no evidence to shew when or how the banks which protect the anchorage-ground first came into existence; nor does it appear whether they were artificially made or were natural banks thrown up by the sea, or whether there was some artificial assistance given to the ordinary action of the sea. If they were originally made or partly formed by the owners of the anchorage-ground, so as to create a protection to ships anchoring there, and have been ever since and still are maintained by the natural action of the sea, there is no reason why the original construction of the banks which protect the anchorage-ground should not be a sufficient consideration for the payment of an anchorage-due by all vessels anchoring and having the option of grounding at low-water and enjoying the advantage of this protection: and, where such a payment has been made from time immemorial, it would seem not unreasonable to presume that it might have had its origin in that way. It is not necessary, however, to rest the case upon any such presumption alone, because in our judgment the maintenance of the buoys and beacons,—and which would further involve the expense of the foundations and cables to which they are attached, —taken in connection with the ownership of the soil of the anchorage-ground, and the advantages which the public derive from the whole, are quite a sufficient consideration to support the legality of the present claim. The payment having been made from time immemorial, it ought clearly to be referred to a legal origin if there be anything to support it; and in our opinion it may well be referred to those services which have been performed

and those benefits which the public have enjoyed to which we have already adverted, and which have existed during the whole period of legal memory.

The view which we take of this case is entirely in accordance with the decision of the House of Lords, which was that the claim could not in point of law be supported in respect of the ownership of the soil alone. After basing his judgment on that ground, Lord Chancellor Westbury proceeds to say (1): "If the payment be claimed as an antient anchorage-due, some facts must be shewn which either prove or from which it can be inferred that the soil claimed by the respondents was originally within the precincts of a port or harbour, or that some service or aid to navigation was rendered to the public, in respect of which the alleged grant was made: but nothing of the kind appears; and no such case can be presumed or inferred from the mere fact of an immemorial payment. No such case is made by the respondents; and the payment is demanded merely on the ground of its having been immemorially made to the lords of the manor of Whitstable and their assigns, in respect of the ownership of the site of an antient oyster-fishery now vested in the respondents." Lord Wensleydale was also of opinion that a consideration must be shewn, by some advantage being conferred upon the public, or by the payment being by way of compensation for injury to the fishery. And Lord Chelmsford considered that the creation and erection of a port or harbour would of itself constitute a sufficient consideration for such a payment.

It was distinctly laid down in that case, and in accordance with previous decisions upon similar rights depending upon long enjoyment for their support, that every intendment ought to be made in favour of a payment which has been uninterruptedly received time out of mind, supposing it to be presumably capable of a legal origin; and that it is the duty of the Court, when the case admits of it, to find a legal origin for a right so long enjoyed.

In the former case, no consideration whatever was attempted to be shewn for the payment. No facts were proved from which it could be inferred. The case was rested solely upon the mere ownership of the soil of the anchorage-ground. There was no fact or circumstance to warrant a presumption that any correspondent

(1) 11 H. L. at p. 208; 20 C. B. (N.S.) 14.

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benefit was given to the public for the imposition of the anchorage-due: and the plaintiffs' case failed on that ground. The facts, however, in the former case were very imperfectly stated: and Lord Wensleydale, feeling probably that there were other circumstances that could be proved, was desirous that the case should have been sent for further investigation upon a new trial, and expressly stated that his own notion was that it was consistent with the statements in that case that some legal ground might be found for the establishment of the right to the anchorage, although upon the then record it appeared to him that there was not sufficient evidence of any such facts.

Upon the statements in the case now before the Court, it seems to us that the defect which existed in the former case has been supplied. The buoys and beacons have been maintained as far back as living memory extends; and we think we ought to presume that they have existed and been maintained from time immemorial: and, when we find that the anchorage-due has been received without interruption during the same period, and therefore ought to be referred to a legal origin if it can be done, we consider that the maintenance of these buoys and beacons may be treated as the consideration for the payment that has been so immemorially made; and, as there would be a benefit to navigation by pointing out the anchorage-ground and one safe channel or entrance to it, under the circumstances before mentioned, we think there would in point of law be a sufficient consideration to support the claim.

Even if these buoys and beacons were maintained wholly and solely for the purpose of preventing vessels grounding upon the oyster-beds, it is not certain that this also might not be a sufficient consideration, upon the principle stated by Lord Wensleydale in his judgment, where he says (1): "It might also be due by right, as a compensation for the injury, by anchoring within the limits of the oyster-fishery, to the breed of oysters. The grant of an oyster-fishery beyond the time of legal memory, which would require some expense and trouble to establish and keep up, would, I am strongly inclined to think, justify the imposition of such toll within the limits where the oysters ought to be placed to breed. Mr. Justice Coltman,—a very able judge,—in the case of *The*

(1) 11 H. L. 214; 20 C. B. (N.S.) 19.

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Mayor of Colchester v. *Brooke* (1), thought that the party might be liable by antient custom to pay to the lord of the manor a reasonable payment, as the owner of a soil where there were oyster-beds, for grounding on the soil."

In the present case, it being also proved that Whitstable was a member or creek of the port of Sandwich; and although in the reign of Elizabeth it was discontinued as a port for foreign goods, it was continued as a landing-place for the coasting-trade; and as the anchorage-ground was in close proximity to it, it is possible that the right might be supportable on another ground suggested by Lord Wensleydale at p. 214 of the report, where he says: "And it may be that the Company of Dredgers may have had the anchorage assigned to them beyond the time of memory by the owners of the port, who may have had the right of anchorage immemorially, by virtue of the right to the port."

Our judgment is, however, founded upon the ground which we have already stated, viz. the maintenance of the buoys and beacons for the purposes and under the circumstances before mentioned, in connection with the plaintiffs' ownership of the soil, and the uninterrupted enjoyment of the anchorage-due from time immemorial.

There is no reason shewn why the payment could not have had a legal origin. Very slight evidence is in our opinion necessary in order to support a right which has been enjoyed uninterruptedly from time immemorial, and the legality of which we are almost bound to presume. And we consider that the circumstances proved in this case are sufficient to support the claim, and that the plaintiffs are entitled to our judgment.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Nethersole & Speechley, for S. & E. Plummer, Canterbury.*

Attorneys for defendant: *Mercer & Mercer, for Towne, Margate.*

(1) 7 Q. B. 339.

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WORTH *v.* GILLING AND ANOTHER 1

2. ————, *Railway Company—Negligently keeping a Station—Passenger bitten by a stray Dog—Scienter—Evidence for a Jury.*] The plaintiff was bitten by a stray dog at a railway station, while waiting for a train. It was proved that at 9 P.M. the dog flew at and tore the dress of a person on the platform; that at 10.30 he attacked a cat in the signal-box near the station, when the porter there kicked him out, and saw no more of him; and that he made his appearance again at 10.40 on the platform, where he bit the plaintiff:—*Held*, no evidence to warrant a jury in finding that the company had been guilty of any negligence in keeping the station reasonably safe for passengers.
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ARBITRATION—*Finality of Award—Silence of Award, as to one of the Matters in Difference brought to the Notice of the Arbitrator.*] By order of nisi prius, a cause and all matters in difference between the parties were referred to an arbitrator. By his award, which professed to be "of and concerning all the matters referred to me in the cause and under the order," the arbitrator, having disposed of the issues in the cause, proceeded as follows:—"And as to the matter concerning two bills of exchange," &c., "I award that the defendants have no further claim to the said bills, and that they be cancelled;" and he then provided for the costs:—*Held*, that the award sufficiently disposed of all the matters in difference, though a cross-claim by the defendants in respect of goods supplied to the plaintiff, which it was sworn had been brought to the notice of the arbitrator, was not *specifically* disposed of.
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2. ————————, *Compulsory Reference under the Common Law Procedure Act*, 1854, *s.* 3—*Charge of Fraud.*] The mere fact that some one item in the account may involve a charge of fraud does not oust the jurisdiction of the judge at chambers to order that the cause be referred to the master, under the 3rd section of the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125).
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BANKRUPT—*Order and Disposition—Chose in Action—Assignment of Policy of Insurance on Bankrupt's Life, without Notice to the Office.*] A. delivered to B. a policy of insurance on his own life, to secure a loan from B., with the intention of giving B. an interest in the sum insured. No notice of the transaction was given to the insurance office:—*Held*, that the policy remained in the order and disposition of A., and that, on his bankruptcy, his assignee was entitled to recover it from B. *Gibson* v. *Overbury* (7 M. & W. 555) distinguished.
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the debt certain shares in a mine conducted on the cost-book system, and covenanted with B. to indemnify him from all manner of charges, liabilities, and costs that might accrue or attach to or in respect of the shares. A. became bankrupt in 1855, and B., having been compelled as a shareholder to pay certain debts of the company which had accrued before A.'s bankruptcy, sued A. on his covenant to indemnify:—*Held*, that A. was not protected either by s. 173 or by s. 178 of the Bankruptcy Act, 1849.

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BANKRUPTCY ACT, 1861 (24 & 25 Vict. c. 134), s. 192—*Composition Deed—Acceptance of Composition under a Deed afterwards held to be void—Receipt of Money under a Mistake of Law.*] The defendant called a meeting of his creditors and proposed a composition of 10s. in the pound, payable by two instalments, and a deed was prepared in supposed compliance with s. 192 of the Bankruptcy Act, 1861. The plaintiffs, who were creditors, declined to assent; but, subsequently, on being informed by the defendant that the deed had been executed by the required number of creditors, and had been registered, and the amount of the instalments having been remitted to them, they took the money and said nothing. The deed was afterwards decided to be void for want of a strict compliance with the provisions of the statute:—*Held*, that the plaintiffs were precluded from suing the defendant for the balance of their debt; as the mistake, if any, under which they had received the instalments, was one of law and not of fact.

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2. ——————————, *Debtor and Creditor—Debts proveable in Bankruptcy—Unliquidated Claim—Deed under s.* 192.] To an action for unliquidated damages, for breach of contract in not accepting timber, the defendants pleaded a deed under the Bankruptcy Act, 1861, s. 192, made after action brought, between the defendants (debtors) of the one part, and trustees on behalf of "undersigned creditors" of the other, by which the defendants conveyed all their estate and effects to the trustees for the benefit of "the creditors of the debtors;" and in consideration thereof, the "said creditors" released the defendants from all debts, claims, and demands whatsoever; averments of the assent of the requisite majority of creditors, and of the due execution by the defendants and the trustees and of the registration of the deed, that possession of the defendants' property was given to the trustees, and that the plaintiff was a creditor in respect of the claim pleaded to within the meaning of the Bankruptcy Act, 1861, and was bound by the deed. The plaintiff was not an undersigned creditor, and did not assent to the deed:—*Held*, that the plea was no

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answer to the action; for that the plaintiff's claim, being for unliquidated damages, and not having been assessed under the provisions of s. 153, was not proveable in bankruptcy, and the plaintiff was not a creditor within the meaning of s. 192, and therefore not bound by the deed.

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3. BANKRUPTCY ACT, 1861 (24 & 25 Vict. c. 134), s. 192—*Composition Deed—Debtor and Creditor—Assent of Creditors before Preparation of Deed—Power of Attorney—Stamp.*] The assent of creditors to a deed under s. 192 of the Bankruptcy Act, 1861, may be given before the deed is executed, or even prepared; all that is necessary is that the deed when drawn up should substantially correspond with the terms of the deed specified in the assent. The assent is not rendered invalid by the mere fact that the document containing it also professes to empower a third person to execute the deed for the creditor, and is not stamped as a power of attorney—following *Matheson* v. *Ross* (2 H. L. C. 286).

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4. ——————————————————, *Deed of Composition—Proviso that Deed shall be at an End if Composition not paid when due—Debtor and Creditor—Execution under fi. fa.*] On the 20th of October, 1866, the defendant executed a deed of composition under s. 192 of the Bankruptcy Act, 1861, by which, in consideration of her covenant to pay her creditors a composition of 5*s.* in the pound by two instalments of 2*s.* 6*d.* each, at three and six months respectively from the date of the deed, the creditors covenanted that, if the instalments were duly paid, they would accept the composition in satisfaction of their respective debts, and that the deed should be an absolute release to the defendant therefrom; proviso, that, unless and until the instalments of the composition, or some or one of them, should become payable and should not be paid within three days after demand, the creditors should not sue, &c., in respect of their debts; and a further proviso, that, in case the instalments, or any of them, should not be duly paid when due, the deed, and the release therein, contained should be at an end. The deed was executed or assented to by the required number and value of creditors, and was duly registered and gazetted, and a certificate of registration was given to the defendant. On the 28th of February, 1867 (the first instalment, payable on the 20th of January, not having been paid or tendered), the sheriff seized the defendant's goods under a fi. fa. at the suit of the plaintiff, a non-assenting creditor:—*Held*, that the deed being by force of the last proviso absolutely void, the certificate of registration was no bar to the plaintiff's execution.

BAKER *v.* PAINTER 492

5. ——————————————————, *ss.* 192, 198—*Deed of Composition—Execution against Garnishee under Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *ss.* 60, *et seq.*] A deed under s. 192 of the Bankruptcy Act, 1861, is a bar to an execution issued against a garnishee under an order made pursuant to s. 63 of the Common Law Procedure Act, 1854, to the same extent that it is a bar to an execution on a judgment.

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6. ——————————————————, *Debtor and Creditor—Composition Deed—Equality—Construction—"On behalf of themselves and all and every other the creditors."*] A deed of composition between the debtor of the first part, and the several creditors whose names were subscribed, "on behalf of themselves and all and every other the creditors," of the second part, professed to be a deed under s. 192 of the Bankruptcy Act, 1861, and to secure the payment of a

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composition to all the creditors, and contained a covenant "with each and every of the said creditors" to pay the composition, and a release by the parties of the second part:—*Held*, that the deed was not void on the ground of inequality, as it might be construed as making all the creditors parties, and therefore capable of enforcing the covenant. *Semble*, that where creditors not executing or assenting to the deed are excluded, the deed is invalid, but the absence of express words to include all creditors does not necessarily render the deed bad.

M'Laren *v.* Baxter 559

7. BANKRUPTCY ACT, 1861 (24 & 25 *Vict. c.* 134), *ss.* 192–197—*Bankrupt Law Consolidation Act*, 1849 (12 & 13 *Vict. c.* 106), *s.* 145—*Lease—Landlord and Tenant.*] The 145th section of the Bankrupt Law Consolidation Act, 1849, applies to deeds registered as mentioned in s. 197 of the Bankruptcy Act, 1861. The defendant, plaintiff's lessee, duly registered a deed under s. 192 of the Bankruptcy Act, 1861, by which he conveyed "all his estate and effects" to trustees for the benefit of creditors:—*Held*, that s. 145 of 12 & 13 Vict. c. 106, applied, and that the conditions of that section being satisfied, he was discharged from liability under the lease.

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BILL OF LADING—*Goods landed at a Sufferance-Wharf, with a "Stop" for Freight—Pledge—What a sufficient Possession to maintain Trover.*] A bill of lading remains in force until there has been a *complete* delivery of the goods thereunder to a person having a right to receive them, and is not spent or exhausted by the landing and warehousing of them at a sufferance-wharf,—at all events so long as they are under stop for freight. A. was indorsee of a bill of lading, drawn in a set of three, making cotton deliverable in London on payment of freight; the cotton had been lately landed, under an entry made by A., at a sufferance-wharf in the port of London, with a stop thereon for freight; on the 4th of March A. obtained from M. an advance of 2500*l.* on the deposit of *two* copies of the bill of lading, M. assuming the third to be in the hands of the master. On the 6th of March (the stop for freight being then removed), A., who had in February instructed B., a broker, to take samples of the cotton and to offer it for sale, obtained from B. an advance of 2000*l.* on the deposit of the *third* copy of the bill of lading, which A. had fraudulently retained. On the 11th of March, B., being informed of the prior advance by M., sent his copy of the bill of lading to the wharf, and procured the cotton to be transferred into his own name, and afterwards sold it and received the proceeds:—*Held*, that the bill of lading, when deposited with M., retained its full force and effect; that there was therefore a valid pledge of the cotton to M.; and he could maintain an action against B., either for the proceeds of the sale, as money received to his use, or for a wrongful conversion of the cotton. [*Affirmed in Ex. Ch. vid. p.* 661, *and next case, inf.*]

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in a set of three, making the cotton deliverable in London on payment of freight. The cotton had been recently landed under an entry made by A., and carried to a sufferance-wharf in the port of London, where it remained, with a stop thereon for freight. On the 4th of March, 1865, A. obtained from the plaintiff an advance of 2500*l.* on the deposit of *two* copies of the bill of lading; A. fraudulently retaining the *third* copy, which the plaintiff supposed to be in the hands of the captain. On the 6th and 7th of March (the stop for freight being then removed), A., who had in February instructed the defendants, cotton-brokers, to take samples of the cotton and to offer it for sale, obtained from them advances to the amount of 2000*l.* on the deposit of the *third* copy of the bill of lading; and on the 11th, being then informed of the prior advance by the plaintiff, they sent such third copy of the bill of lading to the wharfinger, and procured the cotton to be transferred into their names, and afterwards sold it and received the proceeds:—*Held*, affirming the judgment of the Court of Common Pleas,—that the bill of lading, when deposited with the plaintiff, retained its full force and effect, and consequently that there was a valid pledge of the cotton to the plaintiff before the advances made to A. by the defendants.

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BILL OF SALE—*Attesting Witness—Bills of Sale Act* (17 & 18 *Vict. c.* 36), *s.* 1.] A company gave a bill of sale of all its property to trustees for certain debenture holders. By a resolution of the directors of the company, it had been provided that the seal of the company should be affixed to documents only in the presence of two directors, who were to *attest* it by their signatures. The deed was sealed with the seal of the company, and adjoining the seal were the words: "Seal of the said company, affixed at a board meeting this 23rd day of June, 1865, in the presence of R. Banner Oakeley, Chairman; R. J. Chilton, Director. Countersigned—Chas. B. Davies, Secretary pro tem." There was no other attesting witness. The bill of sale was duly registered, but the affidavit filed with it contained only the address of Chas. B. Davies, and not that of R. B. Oakeley or of R. J. Chilton:—*Held*, that the latter were not attesting witnesses, because they did not attest an execution of the deed already completed, their signatures forming part of such execution; and that the affidavit was therefore sufficient, and the bill of sale good. *Shears* v. *Jacob* (Law Rep. 1 C. P. 513) approved.

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See PARLIAMENT. 5.

BROKER—*Evidence of acting as Broker within the* 6 *Ann. c.* 16, *and* 57 *Geo.* 3, *c. lx.*] A witness stated that he took one S. to an office in the City of London used by the defendant, and that upon that occasion four memoranda were made by the defendant, each of the sale by S. of 1000*l.* stock to a person whose name did not transpire; that nothing was handed over at the time; and that he did not see any money pass:—*Held*, evidence for the jury of an acting by the defendant as a broker, within the 6 Ann. c. 16, and 57 Geo. 3, c. lx.
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CHARTERPARTY—*Construction—Proviso for Cesser of Charterer's Liability on Shipment of Cargo—Lien for Freight, Dead-freight, and Demurrage.*] By a charterparty for a voyage from London to Antwerp, the cargo was to be loaded and discharged with all dispatch, and freight to be paid in cash on unloading and right delivery; "the charterers' liability on this charter to cease when the cargo is shipped, provided the same is worth the freight on arrival at the port of discharge; the captain having an absolute lien on it for freight, dead-freight, and

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demurrage, which he, or owner, shall be bound to exercise :"—*Held*, that a plea setting out the above condition, and averring "that the cargo was shipped, and that the same was worth the said freight on arrival at the port of discharge, and that thereupon the defendants' liability as charterers upon and under the charterparty ceased," was a good answer to an action by the shipowner against the charterers for delay in loading the vessel in London.

BANNISTER *v.* BRESLAUER AND ANOTHER 497

2. CHARTERPARTY, construction of "on right delivery of cargo" in .. 348
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CHURCHYARD—*Freehold of, in whom vested—New District—Effect of s.* 10 *of Lord Blandford's Act*, 19 *&* 20 *Vict. c.* 104.] In 1816, under a local act, a new church was built in St. Pancras, which was to be "the parish church," the old church being thereby converted into a "parish chapel." In 1853, by an order in council, the original burial-place for the parish, which surrounded the old church, and also an additional ground provided under an earlier local act, were closed, and a cemetery was provided for the whole parish. In 1863, that part of the parish in which the old church stood was formed into a new district, and the "parish chapel" was declared to be the church of that district :—*Held*, that the 10th section of Lord Blandford's Act, 19 & 20 Vict. c. 104, did not operate to vest the old churchyard in the incumbent of the new district church, but that the freehold thereof still remained in the vicar of the parish.

CHAMPNEYS, CLERK, *v.* ARROWSMITH, CLERK 602

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COMMON CARRIER—*Delay in delivering Goods—Remoteness of Damage—Hotel Expenses.*] A commercial traveller delivered a parcel of samples to a common carrier to be carried to A., but did not state the contents of the parcel, or the purpose for which it was required. By the negligence of the carrier the parcel was delayed, and the traveller spent three days at A. unemployed, waiting for it. In an action against the carrier for negligence, in which the hotel expenses of the traveller during the time he was waiting for the parcel were claimed as damages :—*Held*, that such damages were too remote, and could not be recovered.

WOODGER *v.* THE GREAT WESTERN RAILWAY COMPANY .. 318

2. ————————, *Railway Company—Contract to carry—Reasonableness of Condition—Loss of Market.*] A contract by a railway company to carry goods by a given train, which ordinarily arrives in London at a particular hour, does not amount to a warranty that it will so arrive, although the company's servants be informed that the object of the sender requires that it should so arrive. Meat was carried by the defendants for the plaintiffs under a consignment-note, on the back of which was printed the conditions upon which it was carried, one of which was as follows:—"The company will not be responsible for any damage to any meat, on the ground of loss of market,

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provided the same be delivered within a reasonable time after the arrival thereof at the station from whence delivery is to be made:"—*Held*, a reasonable condition.
LORD AND ANOTHER *v.* THE MIDLAND RAILWAY COMPANY .. 339

COMMON LAW PROCEDURE ACT, 1852, s. 123 12
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COMPANIES ACT, 1862 (25 & 26 *Vict. c.* 89)—*Construction of s.* 153—*Contract for Purchase of Shares before Petition for winding-up—Rules of Stock Exchange.*] A contract for the purchase of shares in a joint-stock company, entered into but not completed by transfer before the presentation of a petition for winding up the company under the Companies Act, 1862 (25 & 26 Vict. c. 89), is not rendered void by the 153rd section of that act. A broker who has bought shares for a customer under such circumstances, and who has in accordance with the rules and regulations of the Stock Exchange been compelled to pay the price of them to the person from whom he bought, is entitled to recover back from his principal the money so paid.
CHAPMAN *v.* SHEPHERD. WHITEHEAD AND OTHERS *v.* IZOD .. 228

2. ——————————————, *s.* 131 — *Voluntary Winding-up—Contract to sell Shares—Execution of Transfer—Rules of Stock Exchange—Principal and Agent.*] Section 131 of the Companies Act, 1862, provides that whenever a company is wound up voluntarily, the company shall from the date of the commencement of such winding up cease to carry on its business, and that all transfers of shares, except transfers made to, or with the sanction of, the liquidators, taking place after the commencement of such winding up, shall be void. The plaintiff, a member of the Stock Exchange, sold for the defendant thirty shares in "Overend, Gurney, & Co.," after that company had commenced winding up voluntarily. The sanction of the liquidators to the transfer of the shares had not been obtained, and the defendant on that account refused to execute a transfer, and the plaintiff was in consequence compelled, by the rules of the Stock Exchange, to furnish to the buyer other shares, for which he paid an advanced price:—*Held*, that, as the statute made the execution of a transfer, without the sanction of the liquidators, only void, but not illegal, the defendant was liable to an action for refusing to execute the transfer, and that whether it was the duty of the buyer or of the seller to obtain the required sanction.
BIEDERMAN *v.* STONE 504

COMPANY—*Scire facias—Assets in Ireland.*] A. having obtained a judgment against a company for 11,000*l.*, moved for a writ of scire facias against a shareholder. The company had no assets in England, but had assets to the amount of 500*l.* in Ireland. There were other creditors of large amounts, one of whom had obtained a rule absolute for a scire facias, with immediate execution against the same shareholder; but the execution had not issued, nor had the amount been paid. A. had obtained rules for writs of scire facias against other

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shareholders to the amount of 30,000*l.*, which had not yet been argued :—*Held*, that the writ of scire facias should issue.
RIGBY AND ANOTHER *v.* DUBLIN TRUNK CONNECTING RAILWAY COMPANY. *Re* BUTLER 586

2. COMPANY, practice as to issuing scire facias against shareholders of a railway 15
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4. ————, liability of chairman of proposed, for expenses of printing prospectuses, &c. 536
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————————, a promise to conduct proceedings in bankruptcy so as to injure as little as possible the debtor's credit, is not a good, to support a contract 196
See CONTRACT. 1.

CONSTRUCTION—*Private Estate Act—Power of Leasing—Mode of Enjoyment.*] By a private act of 6 Geo. 1, c. xxix., passed in 1720 for the purpose of confirming a prior settlement, the Shrewsbury estates were limited to the issue of the settlor as they should succeed to the earldom; and the act contained powers for each successive tenant for life or in tail to lease all or any part of the lands for three lives or twenty-one years, or for any term of years determinable on three lives, so as there should be reserved and made payable by

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every such lease the usual and accustomed yearly rents, boons, and services, with a proviso for re-entry for non-payment. By a subsequent act, passed in 1803, certain outlying portions of the estate were conveyed to trustees, "for ever freed, released, and discharged, and absolutely acquitted, exempted, and exonerated, of and from all and every the uses, trusts, estates, entails, remainders, charges, *powers*, provisoes, limitations, and agreements in and by the settlement and the act of 1720 respectively created, limited, provided, and declared of and concerning the same hereditaments and premises, or any of them, except only such leases as had been theretofore made and granted of the same in pursuance of the powers contained in the said settlement and act," in trust to sell, and, on payment of the purchase money, to convey the same to the purchasers "freed and discharged, and acquitted, exempted, and exonerated as aforesaid,"—the proceeds of such sales to be laid out in the purchase of other lands, to be subject to the same uses, &c., as the lands so sold. By the 7th section of the act of 1803 it was enacted and declared, that, "in the meantime and until the said manors, lands, &c., thereby directed to be sold, should be sold in pursuance of the trusts aforesaid, the same premises respectively should be held, possessed, and enjoyed, and the rents, issues, and profits thereof should be had, received, and taken by and be applied to and for the benefit of such person and persons as would have been entitled thereto, and ought to have held, possessed, or enjoyed and received the same respectively in case that act had not been made." No sale was effected under the powers conferred by this act: and in 1838 the then earl granted to one Pim a lease of a portion of the land so vested in the trustees for sale, for ninety-nine years, provided three persons named, or either of them, should so long live, at the yearly rent of 30*l.*, Pim covenanting to lay out 1000*l.* in building on the land within five years:—*Held* by the Exchequer Chamber,—affirming the judgment of the Court of Common Pleas,—that the earl had no power to lease the land in question so as to bind succeeding tenants in tail of the Shrewsbury estates.

THE EARL OF SHREWSBURY AND ANOTHER *v.* KEIGHTLEY AND OTHERS .. .. (Ex. Ch.) 130

2. CONSTRUCTION—*Apprenticeship Deed—Compliance with Condition.*] A deed of apprenticeship contained a provision that, in the event of the failure of the health of the apprentice, so as to incapacitate him from following the profession of a civil engineer, before the 1st of April, 1866, the master should refund to the father 50*l.* of the premium; it being agreed that the production at any time before that day of a certificate signed by two duly-qualified medical men, testifying as to the fact, should be conclusive evidence that the health of the apprentice had failed, so as to incapacitate him from following his profession. The health of the apprentice failed, and he died on the 4th of August, 1865. On the 28th of March, 1866, the defendant (the master) was served with a certificate in the terms of the condition, dated the 24th of March, but referring to the state of health of the apprentice in June, 1865:—*Held*, that the certificate was a sufficient compliance with the condition to entitle the father to recover the 50*l.*

DERBY *v.* HUMBER 247

3. ————————, *Devise—Power of Leasing—Lease of Mines, &c.*] A testator, by a will made in 1798, devised all the residue of his real estates to his daughter for life, without impeachment of waste, save as thereinafter mentioned, and with a restriction against alienation; remainder to her first and other sons in tail, with some other remainders; remainder to T. P. in tail; remainder to the testator's right heirs. The will contained powers to the devisee for life to charge the

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property to a limited extent in favour of her husband and children; and it then gave to her, and to each tenant in tail, power to lease any of the *lands* for twenty-one years, and no more, for the best improved rent that could be got for them, with a reservation to the lessor of the right to work and take mines and minerals thereunder. Then followed a special reservation of all timber, woods, and underwood for twenty years from the testator's death. The will then proceeded,—"And it is my will and desire, and I do hereby order and direct . . . *that it shall and may be lawful for my said daughter to work, or contract for, lease, or set out to be worked and wrought*, all the coal, culm, &c., or other ore, mines, and minerals which are already known and discovered, or which may be hereafter found out and discovered in or under my real estates;" the "issues, proceeds, and profits" to be paid over to trustees, and to be by them laid out in the purchase of lands, to be settled to the same uses, &c., as the rest of the testator's estate. The devisee for life, who was the testator's only child, in 1840, in the exercise of this power, demised to M., for *twenty-one* years (or for *sixty* years, if she had authority to do so), "all the mines, &c., of coal, culm, &c., under three farms described, with liberty to the lessee, his executors, &c., to use all lawful means for finding any coal or culm, and raising it and disposing of it; to make shafts, watercourses, and railroads, and to use a sufficient part of the said land for placing coal to be raised therefrom, *and also any other coal;* to erect engines for working the said mines, *or any other mines;* to build houses for the miners working the demised mines, *or mines belonging to any other person;* to do all such other acts in, under, or upon the said farms *as shall be deemed expedient in working the mines and seams of coal hereby demised, or belonging to any other person*, and to have ingress and egress for customers to carry away coal from the said mines, *or belonging to any other person*,"—making satisfaction to the tenants and occupiers for any damage occasioned by reason of the liberties and privileges thereby granted, and using and pursuing the same respectively. An annual rent of 40*l.* and certain royalties were reserved, and the lessee covenanted to pay rent, &c., to work the mines in a workmanlike manner, to make satisfaction for damage, &c. In ejectment by T. P., the remainderman, against the lessee, the jury having found that the covenants contained in the lease were "usual, ordinary, and reasonable covenants:"—*Held*, by the Exchequer Chamber,—reversing the *formal* judgment of the Court of Common Pleas (that Court having been equally divided),—that the will gave to the tenant for life merely a liberty to work the mines herself, or to contract with another for working them, and not a power to lease the mines for a term to extend beyond the duration of her life-estate.

JEGON *v.* VIVIAN .. .. (Ex. Ch.) 422

4. CONSTRUCTION—*Devise—Technical meaning of "Issue" controlled by Implication from the Context—Rule in Shelley's Case.*] Where an estate is given for life, and the remainder to the "issue" is accompanied by words of distribution and by words which would convey an estate in fee or in tail to the issue, the estate of the first taker is limited to an estate for life; and that whether the estate is given in fee to the issue by the usual technical words "heirs of the body," or by implication. By a will made in 1806, the testator devised lands to his son S. B. for life, with remainder to trustees to preserve contingent uses; and, from and after the decease of S. B., "to the use of all and every the issue, child, or children of the body of S. B. lawfully to be begotten, in such shares and proportions, manner and form, as S. B. by deed or will shall limit, appoint, or devise the said premises;" and, "in default of such issue," to the use of other sons of the testator and

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their heirs, as tenants in common:—*Held*, that S. B. had power to appoint to his children in fee, and that, although there was no gift to the issue or children in default of appointment, they, under the terms of the will, took the same estate as S. B. had power to appoint to them, viz., an estate in fee; and, therefore, that the first taker, S. B., was entitled to an estate for life only, and not to an estate tail.

BRADLEY *v.* CARTWRIGHT AND OTHERS 511

5. CONSTRUCTION—*Mortgage Deed—Conveyance in Fee by general Words, where the Grantor has only a Moiety of the Land in Fee, and is Lessee of the other Moiety.*] A., being possessed of an undivided moiety of a messuage in Ratcliffe Highway in fee, and having a lease of the other moiety with covenants to repair and insure and not to assign without licence, by deed,—reciting that he was seised in fee of the messuage in Ratcliffe Highway, and also of two leaseholds, one in Newgate Street, the other in Crawford Street,—granted to C., by way of mortgage in fee, all his estate and interest in the messuage in Ratcliffe Highway, in the most general words, and also granted to C. an underlease of the premises in Crawford Street, and covenanted to assign to her the premises in Newgate Street, to secure payment of a debt:—*Held*, that the undivided moiety in fee which A. had in the messuage in Ratcliffe Highway alone passed by this deed, and not his leasehold interest in the other moiety.

FRANCIS AND WIFE *v.* MINTON 543

6. ———————, *Contract—Complete Performance prevented by a Misfortune beyond the control of either Party.*] Where A. contracts to do work and supply materials upon the premises of B. for a specific sum, to be paid on completion of the whole, A. is not entitled to recover anything until the whole work is completed, unless it be shewn that the performance of his contract was prevented by the default of B. The plaintiffs contracted to erect certain machinery on the defendant's premises at specific prices for particular portions, and to keep it in repair for two years,—the price to be paid upon the completion of the whole. After some portions of the work had been finished, and others were in the course of completion, the premises with all the machinery and materials thereon were destroyed by an accidental fire:—*Held*,—reversing the judgment of the Court of Common Pleas,—that both parties were excused from the further performance of the contract; but that the plaintiffs were not entitled to sue in respect of those portions of the work which had been completed, whether the materials used had become the property of the defendant or not.

APPLEBY AND ANOTHER *v.* MYERS .. .. (Ex. Ch.) 651

7. ———————, *Contract—Condition—Sale of Cotton "to arrive," guaranteed equal to Sample; Allowance to be made for Inferiority of* Quality—*Bulk tendered of a different* Kind.] The defendants, through a broker, bought of the plaintiff "the following cotton, viz., $\frac{D.\,C.}{C.}$ 128 bales at 25*d.* per lb., expected to arrive in London per *Cheviot* from Madras. The cotton guaranteed equal to sealed sample in our (the brokers') possession. Should the quality prove inferior to the guarantee, a fair allowance to be made." The sample was of "Long-staple Salem" cotton. The 128 bales marked $\frac{D.\,C.}{C.}$ which arrived by the *Cheviot* contained "Western Madras" cotton. Upon a special case, in which it was stated that "the cotton was therefore not in accordance with the sample; that Western Madras cotton is inferior to Long-staple Salem, and requires machinery for its manufacture different to that which is used for Long-staple Salem; and that the market-price of Western Madras was at the date of the contract only 23*d.* per lb.:"—*Held*, that the cotton tendered was not that which the defendants bargained for, and that they were not bound to accept it; for, that

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the allowance clause had reference only to inferiority of *quality*, and not to difference of *kind*. [*Affirmed in Ex. Ch. vide p. 677, and next case, inf.*]
AZÉMAR *v.* CASELLA AND ANOTHER 431

8. CONSTRUCTION—*Contract—Sale of Goods "to arrive," guaranteed equal to Sample; Allowance to be made for Inferiority of* Quality—*Bulk tendered of a different* Kind.] The defendants, through brokers, bought of the plaintiff "the following cotton, viz. $\frac{\text{p. c.}}{\text{c.}}$ 128 bales, at 25*d.* per lb., expected to arrive in London per *Cheviot* from Madras. The cotton guaranteed equal to sealed sample in our (the brokers') possession. Should the *quality* prove inferior to the guarantee, a fair allowance to be made." The sample was of "Long-staple Salem" cotton. The 128 bales marked $\frac{\text{p. c.}}{\text{c.}}$ which arrived by the *Cheviot* contained "Western Madras" cotton. Upon a special case, in which it was stated that there were at the time of the contract different kinds of Madras cotton known in the market, and divided into certain classes and divisions; that the cotton tendered was not "Long-staple Salem," but a particularly good sample of Western Madras; that "the cotton was therefore not in accordance with the sample;" and that "Western Madras cotton is inferior to Long-staple Salem, and requires machinery for its manufacture different to that which is used for 'Long-staple Salem:'"—*Held*,—affirming the judgment of the Court of Common Pleas,—that the cotton tendered was not that which the defendants bargained for, and that they were not bound to accept it with an allowance; for, that the allowance clause had reference only to inferiority of *quality*, and not to difference of *kind*.
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CONTRACT—*Consideration—Bankruptcy—Application for Costs.*] A promise not to apply for costs, under the 85th section of the Bankruptcy Act, 1849 (12 & 13 Vict. c. 106), is a sufficient consideration to support a contract to pay the amount of such costs. A promise to conduct proceedings in bankruptcy so as to injure as little as possible the debtor's credit, is not a good consideration to support a contract.
BRACEWELL AND OTHERS *v.* WILLIAMS 196

2. ————, *Construction—Arbitration—Misconduct of Arbitrator, how taken Advantage of.*] A., on the 7th of April, 1866, contracted to buy of B. 250 bales of cotton, "to arrive in Liverpool per ship or ships from Bombay," on the terms of the printed rules of the Cotton Brokers' Association of Liverpool, as indorsed on the contract, at a certain price per lb. "for fair new merchants' Oomrawattee, *March or April shipment.*" By one of the rules referred to, it was provided that, upon such a contract, the name of the ship must be given to the buying broker "*within two calendar months next after the date of shipment named in the contract*;" and by other rules it was provided that, "in case of any dispute arising out of a contract," the matter was to be referred to two members of the association; and that, in the event of one of the parties neglecting for three days after notice to appoint an arbitrator, the chairman of the association was to name two, whose award was to be final, &c. On the 21st of June, the seller's broker gave the buyer's broker the name of a ship on board of which were 225 bales of the cotton, *which was shipped at Bombay on the 19th of March.* A. declined to accept the cotton, on the ground that the name of the ship had not been given within two calendar months next after the date of shipment:—*Quære*, whether the period of two months for the declaration of the ship was to reckon from the last day of the actual shipment of the cotton, or from the end of the two months' limit mentioned in the contract? A dispute having arisen as to the meaning of the contract, A. appointed one J. as arbitrator on his part. B. neglecting to appoint his arbitrator, the chairman of the association appointed two, viz. J. and one D.; but B. objecting to J., inasmuch as he had been the person originally named by A., the chairman withdrew his name, and appointed one H. in lieu of him; and the two arbitrators so appointed, having been furnished by A.'s broker with a copy of the contract and of the correspondence, without giving B. an opportunity of being heard, and within two hours of his receipt of notice that they had been appointed, made an award, holding that the declaration made on the 21st of June was not a proper one, and consequently that the buyer had power to cancel the contract:—*Semble*, that the omission to give B. (the seller) an opportunity of being heard before them was misconduct on the part of the arbitrators, and good ground of objection to the award if taken in the proper manner, viz. by motion to set it aside or refer it back; but *held*, that it could not be set up by way of plea to an action upon the award, or by way of replication to a plea relying upon the award.
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CONVOCATION—*Prebendaries—Cathedral Chapters—Right of Voting for Proctors.*] The non-residentiary prebendaries of cathedrals have ceased to be members of the chapters since the passing of 3 & 4 Vict. c. 113, and have therefore no right to vote at the elections of proctors to represent the chapters in convocation.
RANDOLPH AND OTHERS *v.* MILMAN AND OTHERS 60

COPYHOLD ACT, 1852 (15 & 16 *Vict. c.* 51), *s.* 16—*Enfranchisement—Facilities for Improvement.*] The lord of a manor is entitled, on the enfranchisement of a customary freehold, to compensation in respect of the advantages accruing to the customary freeholder from the removal of restrictions on leasing or other disabilities attending his customary estate. The amount of the compensation is a question of fact for the valuer, and depends upon the extent to which the value of the property is in the particular case increased by the removal of such restrictions.
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GRAVES *v.* ASHFORD AND ANOTHER .. .. (Ex. Ch.) 410

COSTS—*Execution, Expenses of—Debt recoverable in County Court—Common Law Procedure Act*, 1852, *s.* 123.] A plaintiff who recovers a debt not exceeding 20*l.*, although deprived of costs by force

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of the County Courts Acts, is nevertheless entitled to levy poundage fees and expenses of execution, in addition to the sum recovered, under the 123rd section of the Common Law Procedure Act, 1852, 15 & 16 Vict. c. 76.
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2. COSTS—*Compulsory Reference—County Court Act* (13 & 14 *Vict. c.* 61), *s.* 11; *Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125, *s.* 3.] An action of contract was compulsorily referred to a master under s. 3 of the Common Law Procedure Act, 1854, and it was ordered that the costs of the cause should abide the event, and that the costs of the reference should be in the discretion of the master. The master awarded to the plaintiff a sum less than 20*l.*, and directed the defendant to pay the costs of the reference:—*Held*, that the plaintiff was not entitled to these costs; for that they could only be recovered upon the judgment entered on the award, and (the judgment being for a sum not exceeding 20*l.*) s. 11 of the County Court Act (13 & 14 Vict. c. 61) deprived the plaintiff of costs.
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See CONTRACT. 1.

4. ———, effect of reversal on appeal of judgment in County Court upon 381
See COUNTY COURT. 1.

COUNTY COURT—*Costs—Jurisdiction of Superior Court, under* 13 & 14 *Vict. c.* 61, *s.* 14.] A county court judge gave judgment on an interpleader issue for the execution creditor, with costs. The Court upon appeal reversed that judgment, and ordered a new trial; holding, that the *whole* judgment, including that part of it which related to the costs, was thereby reversed.
GAGE *v.* COLLINS 381

2. ———————, *Practice—Time for moving for New Trial.*] Where an action has been tried by a county court judge, under the provisions of 19 & 20 Vict. c. 108, s. 26, the time within which a motion for a new trial must be made runs from the day of the hearing of the cause, and not from the filing in the master's office of the registrar's certificate of the result.
COPCUTT *v.* GREAT WESTERN RAILWAY COMPANY 465

3. ———————, plaintiff entitled to expenses of execution, although deprived of costs by force of statutes relating to 12
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CREDIT, a promise to conduct proceedings in bankruptcy so as to injure as little as possible the debtor's, is not a good consideration for a contract 196
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CUSTOM—*Licence to Fish—Reasonable Fee—Legal Origin.*] The owners of an oyster fishery had, since the reign of Elizabeth, held courts, and granted, for a reasonable fee, licences to fish, to all persons inhabiting certain parishes who had been apprenticed for seven years to a duly licensed fisherman. In an action by a person so qualified against the owners of the fishery for not granting him a licence to fish, on payment of the usual fee:—*Held*, that as every act of fishing had been by licence, there had been no enjoyment as of right so as to give rise to a custom. *Semble*, that it was no objection to the custom, if otherwise good, that the fee alleged to have been paid for the licences was not a fixed fee, but a fee of reasonable amount. *Bryant* v. *Foot* (Law Rep. 2 Q. B. 161) and *Lawrence* v. *Hitch* (Law Rep. 2 Q. B. 184, n.) questioned.
MILLS *v.* THE MAYOR, ALDERMEN, AND BURGESSES OF COLCHESTER 476

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DEBTOR AND CREDITOR—*Building Contract, Construction of—Equitable Interest of Owner of Land in Materials brought upon the Premises for the Purpose of being used in the Erection of the Houses—Bill of Sale.*] By a building contract,—after providing for the erection of houses, and the granting of leases thereof to the builder as they should be finished, and for advances to be made by A., the owner of the land, to enable B., the builder, to carry on the work, to be repaid before the leases were granted,—it was agreed by Article 7, that "*all materials* which should have been brought upon the premises by B. for the purpose of erecting such buildings, should be considered as immediately attached to and belonging to the premises, and that no part thereof should be removed therefrom without A.'s consent;" and

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by Article 8 it was further agreed that, "in case B., his executors, &c., should fail to proceed with the erection and completion of the houses, or any of them, within the times specified, it should be lawful for A., his heirs, &c., to enter upon and take possession of the whole or any part of the land not leased, with all buildings and improvements thereon, and *all bricks and other building materials* thereon, for his and their own absolute use and benefit":—*Held*, that the 7th article gave A. such an equitable interest in the *materials* as to disentitle the sheriff to seize them under an execution against B.; and that A.'s rights under that article were not in any way qualified by the provision contained in the 8th article. *Held*, also, that the instrument was not an "assignment, transfer, or other assurance of personal chattels," or a "licence to take possession of personal chattels as security for a debt," within the Bills of Sale Act, 17 & 18 Vict. c. 36.
BROWN AND ANOTHER *v.* BATEMAN 272

2. DEBTOR AND CREDITOR—*Deed—Assignment of Debts—Implied Covenant of Assignor not to do any Act in Derogation of his Deed.*] A. and B. by deed assigned to C. "all and singular the debts due and owing by the parties named in the schedule hereunder written to A. and B.," with power to C. to sue in the names of A. and B. C. having brought an action in the names of A. and B. against a debtor whose debt was stated in the schedule to be 250*l.*, and having obtained a capias to hold him to bail, A. caused the sheriff to discharge the debtor. In an action against A. upon the implied covenant in the deed that he would do no act in derogation of his grant, A. pleaded that the debtor was, without his knowledge or consent, wrongfully and unlawfully held to bail for a much larger amount than was then owing by him to A. and B., and for a much larger amount than the sum of 250*l.* mentioned in the schedule as due from him; therefore the defendant ordered him to be discharged:—*Held*, no answer to the action.
GERARD *v.* LEWIS 305

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4. ———————, distress for rent not available for more than one year's rent against a tenant who has executed a deed under s. 192 of the Bankruptcy Act, 1861 453
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EQUITABLE SET-OFF—*Assignment of Chose in Action—Lloyd's Bond.*] When an equitable chose in action has been assigned, the debtor cannot set off against the assignee a debt which has accrued due to him from the assignor since the notice of assignment, though resulting from a contract entered into previously, unless from the nature of the transaction it appears to have been intended between the original parties that the one should be set off against the other. The assignees of a Lloyd's bond sued the makers in the name of the original bondholder; the makers sought to set off arrear of rent due from the original bondholder, which had accrued due since notice of the assignment, upon a lease granted after the making of the bond, but before notice of assignment. On equitable pleadings stating these facts:—*Held*, that the defendants could not set off the arrears of rent.
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ESTOPPEL, effect of receiving possession of land as 553
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EVIDENCE—*Statement of Witness in former Action—Privity of Estate—Mutuality.*] In an action of ejectment A., the plaintiff, proposed to cross-examine a short-hand writer as to the evidence given in a former action by a witness who had since died. The former action was ejectment by A.'s son, who claimed as A.'s heir-at-law, under the supposition that A. was dead, to recover the same premises from the defendant's father:—*Held*, that there was no privity of estate between A. and his son, and that the evidence, not being admissible against A., was not admissible for him 117
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FEME COVERTE: *See* MARRIED WOMAN.

FOREIGN ATTACHMENT—*Vexatiously suing in the Mayor's Court, London, pending an Action in this Court for the same Cause—Staying Proceedings.*] Two actions were brought in this court, one by A., a merchant at Naples, against B., the other by B. against A., for alleged breaches of two several contracts for cargoes of timber to be shipped at Moulmein and to be delivered at Genoa. In the first action A. recovered judgment for 3801*l.* 13*s.* 4*d.*, and on the 14th of November, 1866, the amount was paid to his attorneys, who carried on business in the City of London; and on the same day an attachment from the Mayor's Court was served upon A.'s attorneys in an action brought in that court at the suit of B. for the same cause as that for which the action of B. against A. was brought in this court:—The Court ordered that the proceedings in the action in this court be stayed, unless B. elected within a week to abandon the proceedings in the Mayor's Court,—deeming the proceedings in the Mayor's Court to be unfounded and vexatious.
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GARNISHEE, a deed under s. 192 of the Bankruptcy Act, 1861, is a bar to an execution issued against, under the Common Law Procedure Act, 1854, to the same extent that it is a bar to an execution on a judgment 502
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INSURANCE: *See* MARINE INSURANCE.

INTERROGATORIES—*Common Law Procedure Act*, 1854, s. 51.] Interrogatories under the 51st section of the Common Law Procedure Act, 1854, will not be allowed where they relate wholly to matter which tends to support the case of the opposite party. In an action for a malicious prosecution on a charge of stealing books, the Court allowed interrogatories requiring the plaintiff to state whether or not certain books described were in his possession, and when, where, and from whom, he bought them, and the price he paid for them
STEWART *v.* SMITH AND ANOTHER 293

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LANDLORD AND TENANT—*Covenant to repair—Condition precedent—Continuing Breach—Recovery in former Action—Liability of Executor of an Executor for a Devastavit by the latter.*] 1. By an indenture of lease made in 1851, Richard Hall demised to one Gorton certain print-works and premises, with the steam-engines, boilers, &c., belonging thereto, the lessee covenanting to keep the premises in good and tenantable repair, "the main walls, roofs, slates, principal timbers, and the outside parts of the said buildings, &c., and accidents by fire, lightning, &c., and the steam-engines, boilers, water-wheels, and first motion therefrom respectively, by the fair and reasonable wear and usage thereof, only excepted," he the said Richard Hall having first put the premises into good and tenantable repair, pursuant to the covenant thereinafter entered into by him: and the lessor covenanted with the lessee that he, his heirs, &c., would forthwith put the premises into good and tenantable repair, and would during the term keep and maintain "the whole of the main walls, roofs, slates, and principal timbers of the premises, and the steam-engines, water-wheels, and first motion therefrom, by the fair and reasonable wear and usage thereof, in good and tenantable repair," &c. In an action by the assignees of the lessee (who had become bankrupt) against the defendant, as

executor of John Hall, who was assignee of the reversion of Richard Hall, the lessor, the first count of the declaration assigned two breaches,—first, the lessor having omitted to do so, that John Hall after he became assignee did not put the demised premises, or any part thereof, into good and tenantable repair,—secondly, that John Hall, whilst such assignee, did not keep and maintain the said main walls, roofs, slates, and principal timbers of the premises, and the said steam-engines, &c., by the fair and reasonable wear and usage thereof, in good repair, &c. The defendant pleaded to the first breach,—fifthly, that John Hall became assignee of the reversion by reason of the death of Richard Hall; that, in the lifetime of Richard Hall, and before John Hall became such assignee, a reasonable time had elapsed, and all things had happened to entitle the lessee to have the covenant to put the premises into repair performed by the lessor; and that the covenant was wholly broken before John Hall became such assignee, —sixthly, repeating the last plea; and further, that, after the death of Richard Hall, the lessee sued John Hall and one Ramsbottom, as executors of Richard Hall, for the said breach of covenant by Richard Hall, and recovered by an award 1080*l.* 2*s.* as damages in respect of that and the second breach of covenant, that the award was a valid and binding award, and that the sum awarded, with costs, had been paid to Gorton before his bankruptcy:—*Held*, that the fifth and sixth pleas were a good answer to the first breach, inasmuch as there could only be one breach of the covenant to put the premises into repair, and that had occurred in the lifetime of Richard Hall. 2. To the second breach,—eighthly, that Gorton sued John Hall, and recovered damages against him for a breach of the same covenant, and that the want of repair complained of in the same breach was only a continuance of the want of repair in respect of which such damages were awarded,—ninthly, for defence on equitable grounds, a repetition of the allegations in the sixth and eighth pleas; and further, that Gorton did not expend the sum so recovered in putting the premises into repair, and that, if he had done so, the want of repair complained of in the second breach would not have occurred:—*Held*, that the eighth and ninth pleas were no answer, as this was a continuing breach, and the former recovery was no bar, even upon equitable grounds, but only matter in mitigation of damages. 3. The defendant further pleaded to the second breach,—tenthly, that such breach was caused by the default of Gorton in not keeping the demised premises (the main walls, &c., and the steam-engines, &c., excepted) in repair according to his covenant. Replication, that the demised premises never were put into repair pursuant to the lessor's covenant:—*Held*, that the covenant by the lessor to put the premises into repair was a condition precedent, and therefore that the replication was an answer to the plea. 4. Eleventh plea, to the second breach, that the want of repair, complained of was not occasioned by fair and reasonable wear and usage:—*Held*, that the plea was bad, as the words in the covenant, "by the fair and reasonable wear and usage thereof," applied only to the "steam-engines, boilers, water-wheels, and first motion therefrom." 5. Twelfth plea, to both breaches, that John Hall had no notice of the want of repair:—*Held*, that want of notice was no answer, at all events, to the first breach. 6. The second count alleged that Gorton recovered by the judgment of a court of error against John Hall as executor of Richard Hall, de bonis testatoris, in an action for breach of covenant by Richard Hall, 1322*l.* 11*s.*, and that John Hall was guilty of a devastavit to the extent of the judgment so recovered. To this count the defendant pleaded that the judgment of the court of error was not entered up within two terms after the verdict:—*Held*, bad, as being an attempt to call in question the judg-

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ment of a court of error. 7. Sixteenth plea, to the second count, that Richard Hall appointed John Hall and one Ramsbottom his executors; that Ramsbottom was at the time of the death of John Hall still living; that John Hall had at the time of his death, and that after his death Ramsbottom had, in his hands personal estate and effects of Richard Hall sufficient to satisfy the judgment, and that the defendant had never had any personal estate and effects of Richard Hall in his hands as executor to be administered:—*Held*, that the plea was bad, the defendant being responsible as executor for the devastavit by John Hall, which the plea admitted.

COWARD AND ANOTHER, ASSIGNEES OF THOMAS GORTON, A BANKRUPT *v.* GREGORY, EXECUTOR OF JOHN HALL, DECEASED .. 153

2. LANDLORD AND TENANT—*Lease, Construction of—Covenant to pay Taxes, &c.—Imposition on Landlord under a Local Improvement Act.*] By the Manchester Improvement Act, 1851, 14 & 15 Vict. c. cxix., the council were empowered to order streets to be sewered and paved by the *owners* of the adjoining premises, and, in case of default by such *owners*, to do the work themselves, and to charge the respective *owners* with their proportionate parts of the expenses thereof, to be recoverable by action of debt, &c. And, by way of additional remedy, the council were empowered to require payment from any present or future *tenant or occupier*, to be levied by distress, and it was made compulsory on the owner to allow such payments to be deducted from the rent. In 1863, premises in G. Street were demised by the plaintiff to the defendant for seven years, at the "clear yearly rent', of 90*l.*, the latter covenanting that he would "pay and discharge all taxes, rates, assessments, and impositions whatsoever (except property-tax) which during the term should become payable in respect of the demised premises." In 1865, the council gave notice to have G. Street sewered and paved. The plaintiff neglecting to do the required work, the council caused it to be done, and assessed his proportion of the expense at 213*l.* 3*s.* 6*d.*, which he paid:—*Held*, that, the payment having been made by the plaintiff, not for a rate, assessment, or imposition which had become payable in respect of the demised premises, but for the breach of a duty imposed upon *him* by the act of parliament, he was not entitled to call upon the defendant under his covenant to repay him the amount. *Sweet* v. *Seager* (2 C. B. (N.S.) 119) distinguished.

TIDSWELL *v.* WHITWORTH 326

3. ——————————, *Agreement for a Lease—Covenant for Title.*] By agreeing to let, a lessor impliedly promises that he has a good title to let.

STRANKS *v.* ST. JOHN 376

4. ——————————, *Debtor and Creditor—Composition Deed—Bankruptcy Acts*, 1849 *and* 1861 (12 *&* 13 *Vict. c.* 106, *s.* 129; 24 *&* 25 *Vict. c.* 134, *s.* 197.] When a tenant executes a composition deed, no distress for rent is available for more than one year's rent accrued due prior to the registration of the deed; the provisions of 12 & 13 Vict. c. 106, s. 129, having been made applicable to composition deeds by 24 & 25 Vict. c. 134, s. 197.

WILLIAMS AND ANOTHER *v.* CADBURY AND ANOTHER 453

5. ——————————, *Estoppel.*] A. let land to B. on a tenancy from year to year, which B. continued to hold for several years after A.'s title had determined, paying rent to A., and he at length gave up possession on a notice to quit from A. Subsequently to the determination of A.'s title, but before B. had given up possession, B. underlet to C. C. paid rent to B. as long as B. continued

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to hold, but paid no rent to any one subsequently. In an action of ejectment brought by A. against C., after B. had given up possession :—*Held*, that it might be presumed, as a matter of fact, that a new tenancy, from year to year, had been commenced by B. after A.'s title had ceased, and that C., therefore, could not dispute A.'s title.

LONDON AND NORTH WESTERN RAILWAY COMPANY *v.* WEST .. 553

6. LANDLORD AND TENANT—*Contract of Tenancy—Right to distrain.*] An agreement for the sale of a public-house contained the following stipulation :—"And, inasmuch as it is intended that E. (the purchaser) shall be let into immediate possession of the hereditaments hereby agreed to be sold, and for the purpose of securing the due performance of the several agreements herein contained, he the said E. hereby admits himself to be a tenant from week to week to S. (the vendor) of the hereditaments hereby agreed to be sold, at the weekly rent of 80*l.*, payable in advance :"—*Held*, that this created the relation of landlord and tenant between S. and E., and gave a right to distrain.

YEOMAN *v.* ELLISON 681

7. ———————————, effect of execution of deed under s. 192 of the Bankruptcy Act, 1861, upon a liability under a lease .. 590

See BANKRUPTCY ACT, 1861. 7.

LANDS CLAUSES CONSOLIDATION ACT, 1845 (8 *& 9 Vict. c.* 18), *s.* 133—*Poor-rate—Assessment.*] Section 133 of the Lands Clauses Consolidation Act, 1845, provides that "if the promoters of the undertaking become possessed by virtue of this or the special act, or any act incorporated therewith, of any lands liable to be assessed to the poor's-rate, they shall . . . until the works shall be completed . . . be liable to make good the deficiency in the assessments for poor's-rate, by reason of such lands having been taken or used for the purposes of the works" :—*Held*, that the promoters are not liable, under this section, to be rated to the relief of the poor in respect of such lands.

THE MAYOR, COMMONALTY, AND CITIZENS OF THE CITY OF LONDON, Appellants; THE CHURCHWARDENS AND OVERSEERS OF THE PARISH OF ST. ANDREW, HOLBORN, Respondents .. 574

2. ———————————, *Easement—Land or Interest therein injuriously affected—Construction of Award.*] An easement is an interest in land for the invasion of which compensation may be claimed under the Lands Clauses Consolidation Act, 1845, 8 & 9 Vict. c. 18. An umpire, to whom was referred a claim for compensation in respect of damage sustained by the plaintiff in consequence of his premises being injuriously affected by the erection of certain works by the defendants under their act of parliament, found by his award that the company had by the erection of such works occasioned a diminution of light to the plaintiff's premises, whereby they were rendered less convenient and suitable for the requirements of his trade carried on therein, and assessed the amount of compensation due in respect of such damage at 656*l.* He further found that, notwithstanding such diminution of light, the saleable value of the plaintiff's interest in the premises was not diminished (the value of property in the neighbourhood generally having become greatly enhanced by reason of the company's works); that, except the said damage in his trade or business, he had not sustained, and would not sustain, any damage in the premises; and that, except the compensation to which he was, or might be, by law entitled in respect of his said trade or business as aforesaid, he was not entitled to any compensation in the premises :—*Held*, that the diminution of light was an injurious affecting of the plaintiff's interest in the premises, which

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entitled him to compensation under the statute; and that it was no answer, that, by reason of accidental circumstances, the saleable value of the premises was not diminished.
EAGLE *v.* THE CHARING CROSS RAILWAY COMPANY 638

3. LANDS CLAUSES CONSOLIDATION ACT, 1845, s. 39 188
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———, by agreeing to let, a lessor impliedly promises that he has a good title to let 376
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———, effect of execution of deed under s. 192 of the Bankruptcy Act, 1861, upon liability under 590
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See EQUITABLE SET-OFF.

LOSS, what amounts to a constructive total, of goods 204
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——, what amounts to a constructive total, of freight 357
See SHIP AND SHIPPING. 3.

—— of certificate of acknowledgment of deed by a married woman, effect of 510
See MARRIED WOMAN. 2.

MALICIOUS PROSECUTION—*Summary Conviction, without Appeal.*] The rule that, in an action for maliciously and without reasonable or probable cause putting the law in motion to the plaintiff's damage, it is essential to aver that the proceeding alleged to have been instituted maliciously and without reasonable or probable cause, has terminated in favour of the plaintiff, if from its nature it be capable of such a termination, applies to a case in which the plaintiff has been summarily convicted under a statute giving no power of appeal.
BASEBE *v.* MATTHEWS AND WIFE 684

MANDAMUS—*Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *s.* 68—*Compulsory taking of Land—Lands Clauses Consolidation Act* (8 & 9 *Vict. c.* 18), *s.* 139.] An action for a mandamus may lie even

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when no actual damage has been sustained. The neglect by a railway company to issue a warrant to the sheriff to summon a jury to assess the value of land which they have given notice that they will require for the purposes of their act, within a reasonable time after such notice, is an actionable wrong, and the issue of such warrant may be enforced by an action for a mandamus under the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 68.

FOTHERBY *v.* METROPOLITAN RAILWAY COMPANY 188

MARINE INSURANCE—*Policy—Liability for Calls.*] In a Lloyd's policy issued by a mutual marine insurance society, the amount of premium paid and the rate per cent. were left blank, but in place of the latter the words "twenty pounds per centum" were added in italics in a separate line. The policy also contained a provision incorporating in the policy the rules of the society. These rules contained nothing which limited the liability of the insurers, but provided that they should make good all losses according to the proportion of their premiums. The managers of the society had been appointed by a power of attorney containing no limitation, and signed by each of the members of the society. In an action by the managers for a call made on one of the members to reimburse themselves for money paid for a loss that had occurred during the time he was a member:—*Held*, that whatever meaning, if any, the words *"twenty pounds per centum"* had, which the Court did not decide, they did not limit the amount for which each member was liable to 20 per cent. on the sum he had insured.

GRAY AND ANOTHER *v.* GIBSON 120

2. ———————, *Constructive Total Loss of Goods—Expenses of drying, landing, and re-shipping—Cost of Transit to Port of Destination.*] Where goods are in consequence of the perils insured against lying at a place different from the place of their destination, damaged, but in such a state that they can at some cost be put into a condition to be carried to their destination, the jury, in order to ascertain whether there is a constructive total loss of the goods, must determine whether or not it is practically possible to carry them on,—that is, whether to do so will cost more than they are worth: and, in determining this, the jury are to take into account all the extra expenses consequent on the perils of the sea, such as drying, landing, warehousing, and re-shipping the goods; but they are not to take into account the fact that, if they are carried on in the original bottom, or by the original ship-owner in a substituted bottom, they will have to pay the freight contracted to be paid; that being a charge to which the goods are liable when delivered, whether the perils of the sea affect them or not. Where the original bottom is disabled by the perils of the sea, so that the ship-owner is not bound to carry the goods on, and he does not choose to do so, the jury are not to take into account the whole of the cost of transit from the place of distress to the place of destination which must be incurred by the goods owner if he carries them on, but only the excess of that cost above that which would have been incurred if no peril had intervened. *Rosetto* v. *Gurney* (11 C. B. 176) approved.

FARNWORTH AND ANOTHER *v.* HYDE .. .. (Ex. Ch.) 204

3. ———————, what amounts to a constructive total loss of freight 357

See SHIP AND SHIPPING. 3.

MARRIED WOMAN—*Discharge from Custody on a ca. sa.—Issue on Plea of Coverture found for Plaintiff.*] A married woman sued as a feme sole pleaded her coverture, and, no evidence being offered at the trial

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in support of the plea, a verdict was found against her, and she was arrested on a ca. sa.:—*Held*, that she was not entitled to her discharge.
POOLE *v.* CANNING 241

2. MARRIED WOMAN—*Acknowledgment of Deed—Loss of Certificate—3 & 4 Wm. 4, c. 74, ss. 84, 85.*] A married woman acknowledged a mortgage deed before a judge, who signed a certificate as required by 3 & 4 Wm. 4, c. 74, s. 84. The certificate was lost before it was lodged with the proper officer of the court for the purpose of being filed:—*Held*, that whether a fresh certificate, if given by the judge, would be valid or not, the Court had no power to authorize him to give one.
IN RE A MARRIED WOMAN 510

MASTER AND SERVANT, action for enticing away servant 615
See PARENT AND CHILD.

MAYOR'S COURT, effect of proceeding in, by foreign attachment, and at the same time suing in one of the superior courts 32
See FOREIGN ATTACHMENT.

MERCANTILE CONTRACT: *See* CONTRACT.

METROPOLIS MANAGEMENT AMENDMENT ACT, 1862 (25 & 26 *Vict. c.* 102), *s.* 106—*Limitation of Action—Claim of Compensation for Injury to Property.*] By s. 106 of the Metropolis Management Amendment Act, 1862, no action or proceeding shall be commenced against the Metropolitan Board of Works for anything done or intended to be done under the powers of that board, under certain statutes, until after one month's notice, and "every such action and proceeding shall be brought or commenced within six months next after the accrual of the cause of action or ground of claim or demand, and not afterwards:"—*Held*, that notice of claim and demand of arbitration for damage done to buildings by the Metropolitan Board of Works, acting under their statutory powers, is not such a proceeding against the Metropolitan Board of Works as to render it necessary that it should be made within six months after the damage is caused.
DELANY AND ANOTHER *v.* THE METROPOLITAN BOARD OF WORKS 532

2. ——————————————————————, s. 106, when notice of action must be given under 449
See NOTICE OF ACTION. 1.

METROPOLITAN MANAGEMENT ACT, 1855 (18 & 19 *Vict. c.* 120), *s.* 250—*Owner—Building Agreement.*] A., being owner in fee of certain land, entered into a building agreement with B., by which B. agreed to build certain houses on part of the land, and lay out the remainder as a garden for the exclusive use of the tenants of the houses, and A. agreed to grant B. a lease of each house as it was built, and to grant him a lease of the garden with the last house; and it was expressly agreed that B. should have no interest in any house or land until a lease of it was granted. B. built some of the houses, but not all, and laid out the garden; and A. subsequently sold the reversions of the houses which were built to C. The parish in which the land was situated having paved a road running past the garden, claimed repayment of the expense from A.:—*Held*, that A. was the owner of the land within the meaning of the Metropolitan Management Acts, 1855 and 1862 (18 & 19 Vict. c. 120, and 25 & 26 Vict. c. 102), and therefore liable.
LADY HOLLAND, Appellant; THE KENSINGTON VESTRY, Respondents 565

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See BANKRUPTCY ACT, 1867. 1.

MORTGAGE DEED, construction of 543
See CONSTRUCTION. 5.

MUSIC AND DANCING in unlicensed house, penalty for 583
See PENALTY.

NEGLIGENCE—*Unfenced Hole on Defendant's Premises.*] A gasfitter, having contracted to fix certain gas apparatus to the defendant's premises, sent his workman, the plaintiff, after the apparatus had been fixed, and by appointment with the defendant, to see that it acted properly. The plaintiff, having for this purpose gone upon the defendant's premises, fell through an unfenced shaft in the floor, and was injured. It was proved that the premises were constructed in the manner usual in the defendant's business, that of a sugar refiner, but that the shaft could, when not in use, have been fenced without injury to the business:—*Held*, affirming the decision of the Court below, that the plaintiff was not a mere volunteer, and was entitled to recover damages from the defendant for the injury which he had sustained.

INDERMAUR *v.* DAMES .. .. (Ex. Ch.) 311

2. ————, *Permissive Use of a Close in which were Dangerous Places.*] The declaration stated that the defendants were possessed of land with a canal and cuttings intersecting the same, and of bridges across the canal and cuttings communicating with and leading to certain docks of the defendants, which land and bridges were used, with the consent and permission of the defendants, by persons proceeding to and coming from the docks; that they wrongfully and improperly kept and maintained the land, canal, cuttings, and bridges, and suffered them to be in so improper a state and condition as to render them unsafe for persons lawfully passing along and over the said land and bridges towards the said docks; and that one G. lawfully passing over and using the bridges, through the wrongful, negligent, and improper conduct of the defendants, fell into one of the cuttings and was drowned:—*Held*, that the declaration disclosed no actionable breach of duty on the part of the defendants.

E. GAUTRET, ADMINISTRATRIX OF LEON GAUTRET, DECEASED *v.* EGERTON AND OTHERS. L. JONES, ADMINISTRATRIX OF JOHN JONES, DECEASED *v.* EGERTON AND OTHERS 371

3. ————, *Railway — Contributory Negligence — Self-imposed Duty.*] A railway, consisting of several lines, crossed a public footpath on a level at a point near the station, but the footpath was not in other respects dangerous. On each side of the railway was a good and sufficient swing gate, as required by the 8 & 9 Vict. c. 20, s. 61. The railway company, by way of extra precaution, usually, but not invariably, fastened the gates when a train was approaching. S., wishing to cross the railway, found the gate unfastened, and a coal train standing immediately in front of it. He waited until the coal train had moved off, and then, without looking up or down the line, commenced crossing the railway, and was killed by a passing train. If he had looked up the line, he would have seen the train coming in time to stop and avoid the accident. In an action against the company by S.'s administratrix under Lord Campbell's Act:—*Held*, that S. contributed to the accident by his negligence, and that the company, therefore, were not liable. *Held* (by Willes, J.), that the mere failure to perform a self-imposed duty is not actionable negligence; that the omission to fasten the gate did not amount to an invitation to

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S. to come on the line; and that, therefore, even if S. was not guilty of contributory negligence, the company were not liable.
SKELTON *v.* LONDON AND NORTH WESTERN RAILWAY COMPANY 631

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5. ———— in keeping a station, action against railway company 4
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6. ————, when notice of action for, must be given under s. 106 of the Metropolis Management, &c., Act 449
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NEW TRIAL, time for moving for, in County Court 465
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NOTICE of claim for borough vote, form of 81
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———— of objection to vote, withdrawal of 88
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————, effect of allowing time for giving, of appeal under s. 37 of the Common Law Procedure Act, 1854, to elapse 174
See PRINCIPAL AND AGENT. 2.

NOTICE OF ACTION—*Metropolis Management Amendment Act* (25 & 26 *Vict. c.* 102), *s.* 106—*Negligence of Contractor.*] The defendant, who was a contractor employed by the Metropolitan Board of Works to enlarge a sewer running into a tidal creek, erected a dam in the sewer, the water above which was removed by pumping. Owing to his negligence in not working the pumps, the sewage flowed back into the plaintiff's premises and injured them. No notice had been given to the defendant before commencing the action:—*Held*, that the injury was occasioned by acts "done or intended to be done under the powers of the Metropolitan Board of Works," within the meaning of 25 & 26 Vict. c. 102, s. 106; and that the defendant, therefore, was entitled to a notice of action.
POULSUM *v.* THIRST 449

2. ————————, "*Found Committing*"—24 & 25 *Vict. c.* 96, *ss.* 103, 113—*Fresh Pursuit—False Imprisonment.*] A. purchased an article of B., and directed him to take it to his house and ask for payment. B. left the article at A.'s house at 1 P.M., and was paid for it by A.'s butler. A. returned home at 3 P.M., and was informed that the butler had paid for the article; and believing, although erroneously, that he himself had paid B. for it at the time of the purchase, immediately sent for a policeman, and ordered him to arrest B. on a charge of obtaining money under false pretences. The policeman and A.'s butler at once went in pursuit of B., and apprehended him at 10 P.M. By 24 & 25 Vict. c. 96, s. 113, it is provided that notice in writing of any action against any person for anything done in pursuance of the act, shall be given to the defendant one month at least before the commencement of the action; and by s. 103 of the same act it is provided that any person found committing any offence under the act (inter alia, obtaining money under false pretences) may be *immediately* apprehended without a warrant by any person. In an action by B. against A. for wrongful arrest:—*Held*, that B. was "found committing the offence," if at all, at 1 P.M., and the pursuit

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not having been commenced till A.'s return at three P.M., A. could not have believed he was acting in pursuance of the statute, and was not entitled to notice.
DOWNING *v.* CAPEL 461

NOTICE OF TRIAL before issue complete, effect of 285
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OBJECTION, notice of, to a vote, form of 86
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"ON BEHALF OF THEMSELVES AND ALL AND EVERY OTHER THE CREDITORS," construction of 559
See BANKRUPTCY ACT, 1861. 6.

"ON RIGHT DELIVERY OF CARGO," construction of words in a charterparty 348
See SHIP AND SHIPPING. 2.

ORDER AND DISPOSITION, when policy of insurance in, of bankrupt 525
See BANKRUPT.

OWNER of land, within 18 & 19 Vict. c. 120, and 25 & 26 Vict. c. 102 565
See METROPOLITAN MANAGEMENT ACT, 1855.

PARENT AND CHILD—*Enticing away a Servant—Contract of Service.*] An action will lie for enticing away the plaintiff's daughter, though there be no allegation that the defendant debauched her, or that there was any binding contract of service between her and the plaintiff. The plaintiff's daughter, who was about nineteen years of age, resided with him as a member of his family, and assisted him in his business of a licensed victualler. By means of a fictitious letter of invitation dictated by the defendant, she procured her mother's consent to her quitting her home for a few days, when she left, and the defendant took her to a lodging-house, where he cohabited with her for nine days, and she then returned home:—*Held*, that there was a sufficient continuing relation of master and servant de facto, and sufficient evidence of a wrongful enticing away of the daughter by the defendant, to entitle the plaintiff to maintain an action against him.
EVANS *v.* WALTON 615

PARLIAMENT—*Borough Vote—Notice of Claim—Insufficient Description of Situation of qualifying Property—Amendment, under* 6 *Vict. c.* 18, *s.* 40.] In a notice of claim to a borough vote the situation of the qualifying property was described in the fourth column as "Ely Place." At the revision it was proved that the houses in Ely Place were numbered, and that the claimant's house was numbered 16; and, upon the application of the claimant, the revising barrister amended the claim by adding the number, and inserted the same on the list of voters:—*Held*,—confirming the dicta in *Flounders* v. *Donner* (2 C. B. 63),—that the amendment was warranted by s. 40 of 6 Vict. c. 18.
BARLOW, APPELLANT; MUMFORD, RESPONDENT 81

2. ————, *Borough Vote—Notice of Objection—Variance in Statement of Voter's Abode—Service by Post—*6 *Vict. c.* 18, *s.* 100.] In "the List of Voters for the city of Rochester, in the county of Kent, in respect of property occupied within the parish of Frindsbury," the place of abode of a voter, J. A., was given as "Canal Road, Frindsbury." A notice of objection was sent by post, under s. 100 of 6 Vict. c. 18, addressed "Mr. J. A., Canal Road, Frindsbury, *Rochester, Kent*:"—*Held*, that the addition of "Rochester, Kent," did not render the service of the notice bad.
COTTON, APPELLANT; PRALL, TOWN-CLERK OF ROCHESTER, RESPONDENT. AKENHEAD'S CASE 86

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3. PARLIAMENT—*Notice of Objection, Withdrawal of*—6 *Vict. c.* 18, *s.* 40.] Notices of objection having been duly served on certain voters, a notice was published by the objector in the local papers, on the 30th of August, that the objector withdrew his objections; he afterwards sent a notice to each voter that the objection was not withdrawn, but would be proceeded with before the revising barrister. At the revision court the notices of objection were proved, but the voters objected that they ought not to be called upon to support their votes, as the objections had been withdrawn. The revising barrister decided that the objections had been withdrawn, and retained the names of the voters objected to on the list, without proof of their qualification:—*Held*, that the revising barrister was wrong: for that, on proof of each notice of objection, he was bound, under s. 40 of 6 Vict. c. 18, to call upon the voter to prove his qualification, and to strike off the name on failure of proof.
PROUDFOOT, APPELLANT; BARNES, RESPONDENT 88

4. ——— ———, *County Vote—Apportionment—Cestui que trust in Possession.*] Certain freehold lands were conveyed to trustees on certain trusts, among others, to pay 5*l.* a year to each of the trustees, which payment was charged upon the whole of the property. Part of the estate, consisting of some woodlands, remained in the hands of the trustees, all the rest of the property being let to tenants. If the 5*l.* payable to each trustee was apportioned between the woodlands and the other lands, the trustees had not 40*s.* per annum each out of the woodlands:—*Held*, assuming each of the trustees could be said to be a cestui que trust for life in possession of the woodlands, the charge must be apportioned over the whole estate, and therefore he had not 40*s.* a year out of the woodlands.
MILLS, APPELLANT; COBB, RESPONDENT 95

5. ———————, *Borough Vote—Notice of Objection—Description of Objector's Place of Abode*—6 *Vict. c.* 18, *s.* 17.] It is a question of fact for the revising barrister whether the description of the place of abode of the objector in a notice of objection is sufficient. Where the description is such, that a letter so addressed would reach the objector by post, and the person objected to could easily find him by inquiry on going to the place stated, it is sufficient.
THACKWAY, APPELLANT; PILCHER, RESPONDENT 100

6. ———————, *Borough Vote—Notice of Objection—Description of List on which Objector appears*—6 *Vict. c.* 18, *s.* 17.] In a notice of objection to a borough voter, the objector was described as "on the list of voters for the parish of P.;" his name was not on the list of occupiers for that parish, but it was on the list of freemen, and in that list he was described as residing in the parish of P.:—*Held*, that the notice was bad. *Tudball* v. *Town Clerk of Bristol* (5 M. & G. 5) affirmed.
BRIGHT, APPELLANT; DEVENISH, RESPONDENT 102

7. ———————, *County Vote*—40*s. Freeholder—Pew in Parish Church —Easement*—8 *Hen.* 6, *c.* 7—2 *&* 3 *Wm.* 4, *c.* 45, *s.* 18—5 *Geo.* 4, *c. lxiv.*] By a private act, 5 Geo. 4, c. lxiv., trustees were appointed to pull down and rebuild on an enlarged site the parish church of O., and to enlarge the burying ground attached to it. By s. 22 all the materials of the old church, and all the fences, &c., of the churchyard, and all the materials that might be collected by the trustees for rebuilding the church, or making new fences, &c. to the churchyard, were vested in the trustees, and it was provided that in bringing actions or preferring bills of indictment against persons injuring the church or stealing the materials, it should be sufficient to state that the church or materials were the property of the trustees. By s. 24

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the rector of the parish and his successors were to be rectors of the new church, and by s. 27 the new church was to be to all intents and purposes the parish church of O. By s. 30 the trustees were required to allot pews and seats in the new church to persons who had been entitled to pews or seats in the old church; and it was provided that such new pews or seats should be held by such persons, their heirs, executors, administrators, successors, and assigns, in the same and in as full and ample a manner as the pews or seats in lieu of which they were allotted had been held by them. By s. 31 the trustees were empowered to sell the fee simple and inheritance of such of the pews in the body of the church as were not otherwise appropriated in pursuance of the act to any persons being inhabitants of the parish; and it was provided that, on the execution of the conveyance thereinafter directed of any pew so sold, such pew should be vested in the purchaser, his heirs and assigns for ever, and might thereafter be sold, conveyed, devised, or otherwise parted with, by the proprietor for the time being, to any other person being an inhabitant of the parish, subject only to the rules, regulations, rates, or impositions to which such pew or its owner might be or become liable in pursuance of the act; and it was further provided that it should not be lawful for any owner of any such pew to sell, convey, let, assign, devise, dispose of, or bequeath the same to any person not being an inhabitant of the parish, and that when any owner of any such pew should die, and such pew should not thereupon descend and go to some person being an inhabitant of the parish, then such pew should descend and go to the trustees and be vested in them, and might be let or sold by them as thereinbefore provided, or in case the functions of the trustees should have ceased, then such pew should go to the churchwardens of the parish, who should let or sell it in the manner and subject to the provisions before mentioned. In s. 32 a form of conveyance was given, in which the trustees granted, released, and conveyed to the purchaser, his heirs and assigns, the pew, and all their right, title, and interest in it. The trustees sold under the act a pew in the body of the church to an inhabitant of the parish, who sold it to another parishioner, A. A. did not occupy the pew by himself or his family, but let seats in it to other parishioners, and received for them more than 40s. a year:—*Held*, that under the act A. had not acquired the freehold of the pew, but only a right to sit in it to hear divine service, and that such a right was in the nature of an easement, and therefore not a tenement within the meaning of 8 Hen. 6, c. 7. *Held*, also, that supposing A. to be possessed of the freehold, his estate was of the nature of a life estate, and within the provisions of 2 & 3 Wm. 4, c. 45, s. 18; and that A., therefore, as he did not occupy it himself, or receive 10*l.* a year for it, was not entitled to a vote for the county in respect of his interest in the pew.

HINDE, APPELLANT; CHORLTON, RESPONDENT 104

PARTICULAR AVERAGE, what evidence admissible to explain meaning of 357

See SHIP AND SHIPPING. 3.

PARTNERSHIP—*Bill of Exchange—Acceptance by one Partner for a Sum which includes his private Debt—Amendment of Declaration, by adding a Count for the Consideration.*] To an action on a bill of exchange the defendant pleaded that he did not accept, and proved that the bill was accepted by his partner in the name of the firm, and included a private debt due from the partner, as well as a debt due from the firm. The defendant had given the partner no authority to accept in the name of the firm for his private debt:—*Quære*, whether the plea was proved? In such a case, the Court amended the declara-

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tion by adding a count for the consideration, and directed a verdict to be entered for the sum really due from the firm, upon terms.
ELLSTON *v.* DEACON 20

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See PROMISSORY NOTE. 1.

PENALTY—25 *Geo.* 2, *c.* 36—*Music and Dancing in Unlicensed House.*] A common informer having recovered in an action from the defendant the penalty of 100*l.* incurred under 25 Geo. 2, c. 36, s. 2, for keeping a house for public dancing and music without the requisite license:—*Held*, that only one penalty was recoverable; and that a second action by another common informer to recover a like penalty was not maintainable.
GARRETT *v.* MESSENGER 583

PERFORMANCE of contract, effect of, being prevented by unavoidable accident. 651
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————————, construction of 422
See CONSTRUCTION. 3.

PRACTICE—*Inspection of Documents at Common Law—Assents to a Deed under the 192nd section of the Bankruptcy Act*, 1861 (24 & 25 *Vict.* c. 134.] A creditor has a right to demand inspection at common law of the written assents to a deed under the 192nd section of the Bankruptcy Act, 1861; they being by virtue of the statute part of the deed itself.
ANDREW AND WIFE *v.* PELL 251

2. ————, *Notice of Trial, before Issue complete—Waiver of Irregularity—Discontinuance—Statute of Jeofails*, 32 *Hen.* 8, *c.* 30.] To a declaration containing two counts, the defendant pleaded three pleas to the first count, and a fourth plea to the second. Issue was joined on the pleas to the first count, and there was a special replication to the fourth plea. Notice of trial was given; and the defendant obtained a rule for a special jury, and the jury was duly nominated, reduced, and summoned; but, when the cause came on for trial, it was discovered that no issue had been joined on the replication to the fourth plea. Before the jury were sworn the judge, upon the application of the plaintiffs (without summons), amended the record by striking out the second count; and, the defendant declining to appear, the plaintiffs obtained a verdict. Upon a motion to set aside the verdict for irregularity, on the grounds that there had been no sufficient notice of trial, and that there had been a discontinuance:—*Held*, that the notice of trial was effectual as to the first count; and the trial valid. That the defendant had waived any irregularity in the notice; and that there was no discontinuance. *Semble*, that the defect in the record, even if it had not been amended, would have been cured, after verdict, by the Statute of Jeofails, 32 Hen. 8, c. 30.
BERRESFORD AND ANOTHER *v.* GEDDES 285

3. ————, *Special Jury.*] A judge at Chambers having refused to grant a special jury at the instance of the defendants, though there had been no laches on their part,—the Court, in the absence of special grounds for so doing, declined to interfere with his discretion.
SMITH *v.* THE LONDON AND ST. KATHARINE'S DOCK COMPANY .. 630

4. ————, as to obtaining a scire facias against a shareholder of a railway company 15
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5. ————, as to amendment of declaration by adding a count 20
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6. ————, as to staying proceedings, where vexatiously taken in two Courts at once 32
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7. ————, as to appeal under s. 37 of the Common Law Procedure Act, 1854 174
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8. ————, as to time for moving for a new trial in a county court .. 465
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9. ————, as to obtaining writ of scire facias against a shareholder in a company 586
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PREBENDARY of cathedral, non-residentiary, not a member of the chapter since, 3 & 4 Vict. c. 113 60
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PRESCRIPTION—*Anchorage-due, what will sustain a Claim for.*] A claim for anchorage-dues on a navigable arm of the sea cannot be supported in respect of the mere ownership of the soil. Such a claim, in the absence of evidence to shew that the place is within the limits of a port or haven, requires some consideration of advantage to the public to sustain it. But, if such a claim be presumably capable of a legal origin, and the payment of dues is shewn to have been uninterruptedly received time out of mind, every intendment will be made in its favour. An oyster-fishery had been possessed and an anchorage-due had been claimed and received from time immemorial by the lords of the manor of Whitstable in respect of all vessels casting anchor within the limits of certain anchorage-ground within the manor. In 1795, the fishery and the soil thereof (including the anchorage-ground) were conveyed by the lord, with all its rights and appurtenances, to the plaintiffs, who thenceforth claimed and received the anchorage-due. There was some evidence that Whitstable was a limb of the port of Sandwich; but there was no direct evidence to shew that the anchorage-ground was within or connected with the port, or that the franchise of the port was ever granted out by the Crown. There was, however, evidence that the lord of the manor was the owner of a landing-place called Le Craston, within the limits of the manor, and that he took toll upon merchandize landed there, and also that he was owner of the anchorage-ground, and took the anchorage-due as such lord and owner of the soil. The recitals in an act of parliament, by which the plaintiffs were incorporated and empowered to purchase the manor and manorial rights, stated that there were "customary payments usually and of right made to the lord of the manor for or in respect of any ship or vessel on the landing of goods or merchandize within the said manor." There was also evidence that the plaintiffs had as far back as living memory extended maintained buoys and beacons, which served the double purpose of pointing out the channel by which vessels of small burthen might safely reach the anchorage-ground, and also of protecting the oyster-beds:—*Held*, that the maintenance of the buoys and beacons, taken in connection with the ownership of the soil of the anchorage-ground, and the benefit to the public therefrom, afforded a sufficient consideration to support the plaintiffs' claim to the anchorage-due.
THE FREE FISHERS OF WHITSTABLE *v.* FOREMAN 688

2. ————, there cannot be a right by, to require the grant of a licence 476
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3. ————, right acquired by, to a private right of way 577
See RIGHT OF WAY.

PRINCIPAL AND AGENT—*Authority of Agent to bind his Principal—Horse-Dealer—Warranty on Sale of a Horse—Usage of Trade—Evidence, admissibility of.*] The agent or servant of a horse-dealer has an implied authority to bind his principal or master by a warranty, even though (unknown to the buyer) he has express orders not to warrant. Evidence of a general practice amongst horse-dealers not to warrant where the horse has been examined by a veterinary surgeon and certified by him to be sound, is not admissible to rebut the inference of authority to warrant.
HOWARD *v.* SHEWARD 148

2. ————————, *Contract by one professing to contract as*

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Agent, but who has no existing Principal—Oral Evidence to contradict —Ratification—Appeal under s. 37 *of the Common Law Procedure Act,* 1854 (17 *&* 18 *Vict. c.* 125)*—Enlarging Time for giving Notice.*] Where a contract is signed by one who professes to be signing "as agent," but who has no principal existing at the time, and the contract would be wholly inoperative unless binding upon the person who signed it, he is personally liable on it: and a stranger cannot by a subsequent ratification relieve him from that liability. A company being projected for carrying on the business of an hotel, and purchasing the premises and stock of the plaintiff, the following agreement was entered into:—"Jan. 27, 1866. To A., B., and C., on behalf of the proposed Gravesend Royal Alexandra Hotel Company. I hereby propose to sell the extra stock, as per schedule hereto, for the sum of 900*l.*, payable on the 28th of February, 1866" (signed by the plaintiff). "We have received your offer to sell the extra stock as above, and we hereby agree to accept the terms proposed." (Signed) "A., B., and C., on behalf of the Gravesend Royal Alexandra Hotel Company." The goods were handed over to the representatives of the proposed company, and were consumed in the business. The company obtained a certificate of incorporation under the Companies Act, 1862, on the 20th of February, but collapsed before the money was paid:—*Held*, that A., B., and C., were personally liable on their agreement, as for goods sold and delivered; that no subsequent ratification by the company could relieve them from that liability without the assent of the plaintiff; and that parol evidence was not admissible to shew that personal liability was not intended. Where a party has through inadvertence allowed the time for giving notice of appeal under the 37th section of the Common Law Procedure Act, 1854, to elapse, the Court may in its discretion allow an appeal, but will be guided in the exercise of that discretion by the particular circumstances of each case.

KELNER *v.* BAXTER AND OTHERS. 174

3. PRINCIPAL AND AGENT, *Ratification of Act of Agent—Public Company—Liability of Promoters for Advances obtained on Account of the Undertaking.*] One J., acting as the solicitor and secretary of a projected railway company, by the authority of the promoters, and by means of a cheque signed by two of them, obtained from the plaintiff an advance of 500*l.*, to be applied in payment of parliamentary fees, upon an agreement expressing that it was "to be repaid out of the calls on shares." An act authorizing the construction of the railway passed, the promoters being named therein as the first directors; and at a meeting subsequently held the directors passed a resolution that the acts of J. should be adopted and confirmed. No shares were allotted or calls made, and the undertaking was not proceeded with:—*Held*, that the advance was made upon the personal responsibility of those who signed the cheque, and that the subsequent adoption of their acts by the directors did not alter their position.

SCOTT, PUBLIC OFFICER OF THE UNION BANK OF LONDON *v.* LORD EBURY AND OTHERS. .. ..

4. ——————————, *Payment—Question of Fact for Jury.*] A. having purchased goods of B. through a broker, paid for them to the broker partly by an advance on his general account with the broker before the delivery of the goods, and partly by cash on a settlement of accounts after the delivery. The broker did not pay over the money to B., and became bankrupt. In an action by B. to recover from A. the price of the goods, except so much as had been paid in cash:—*Held*, that it was a question of fact for the jury, whether payment to a broker in advance was a good payment as against the principal, depending on the custom of the trade; and that

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question not having been left to the jury, the Court ordered a new trial.

CATTERALL *v.* HINDLE .. .. (Ex. Ch.) 368

5. PRINCIPAL AND AGENT—*Authority of Agent—Liability of Chairman of Committee of proposed Company.*] The defendant was associated with one W. and others in the formation of a public company. At a meeting of the projectors, of which the defendant was chairman, a resolution was passed that the prospectus then read and marked with the initials of the defendant be approved and printed for private circulation; and at a subsequent meeting, of which also the defendant was chairman, a further resolution was passed "that the prospectus as altered and marked with the chairman's initials, be approved as the prospectus of the company, and that the same be printed for circulation and advertised at the discretion of W. as early as possible." W. employed the plaintiffs to print the prospectus, shewing them the initialled copy, and telling them that he was authorized by the defendant to get it printed. The prospectus when printed was delivered at the office of the company, and was adopted and circulated by the defendant. There was an arrangement, not communicated to the plaintiffs, between the defendant and W. that all expenses of forming the company, down to the allotment of shares, were to be borne by W.:—*Held*, that there was evidence from which the jury might infer that W. had authority to pledge the defendant's credit for the printing.

RILEY AND ANOTHER *v.* PACKINGTON 536

PRINCIPAL AND SURETY—*Money Club, Promissory-note for a Loan by—Appropriation of Payments.*] The surety on a promissory-note given to secure a loan to a member of a money club formed for the purpose of raising money by means of monthly subscriptions, and lending it in small sums at interest to the members, and dividing the proceeds when the shares are fully paid up and the loans repaid, cannot rely upon the monthly subscriptions and premiums paid by his principal, as payments in reduction of his liability upon the note.

WRIGHT AND ANOTHER *v.* HICKLING AND OTHERS 199

2. ———————, *Increase of the Duties of Principal—Liability of Surety.*] Declaration on a bond conditioned for the due performance by A. of his duties as collector of the poor rates, and of the sewers and general rates for the parish of S., the bond to continue in force if A. held either office separately. Breach, that A. received money in each capacity, and failed to pay it over. Plea, that before breach two acts were passed increasing A.'s duties as collector of sewers and general rates, and under which he was also appointed collector of main drainage rates, by the persons under whom he held his other appointments. These acts altered the proportion in which certain sewers rates were to be borne by different parishes, increasing the proportion payable by the parish of S., and also imposed upon the sewers rates certain fresh charges of small amount:—*Held*, affirming the judgment of the Court of Common Pleas, that the appointment of A. to the new office of collector of main drainage rates did not avoid the bond. *Held*, also, that the changes introduced by the acts did not amount to an alteration of the office of collector of sewers rates to which A. was originally appointed, and therefore did not avoid the bond. *Held*, also (Martin, B., dubitante), that the bond was divisible, and that the plea was bad, as affording no answer to the defendants' liability for A.'s breaches of duty as collector of poor rates.

SKILLETT AND OTHERS *v.* FLETCHER AND ANOTHER .. (Ex. Ch.) 469

PRIVATE ESTATE ACT, construction of 130
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PROCTOR, right of voting for 60
See CONVOCATION.

PROMISSORY NOTE—*Suspension of Right of Action—Payment.*] Declaration upon the common counts. Plea, that the defendant, with the plaintiffs' consent, had delivered a promissory note on account of the debt to C., who still held it. Replication, on equitable grounds, that C. at the time of the delivery had been and still was a trustee of the plaintiffs, who were alone beneficially interested in the note, of which the defendant had notice, and that the note was overdue and unpaid:—*Held*, on demurrer, a good replication.
THE NATIONAL SAVINGS BANK ASSOCIATION, LIMITED *v.* TRANAH 556

2. ——————— for loan by a money club, liability of a surety upon 199
See PRINCIPAL AND SURETY. 1.

PROMOTER of company, liability of, for advances obtained on account of the undertaking 255
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PROPERTY in goods passes on contract of sale, when 127
See SALE OF GOODS. 1.

PROSECUTION, action for malicious 68
See MALICIOUS PROSECUTION.

PUBLIC HEALTH ACT, 1848 (11 & 12 *Vict. c.* 63), *s.* 144—*Damage.*] A board of public health are not bound to give compensation, under the Public Health Act, 1848 (11 & 12 Vict. c. 63), s. 144, for any damage which they may cause, which would not have been actionable if they had not been acting under the authority of the act.
HALL *v.* THE MAYOR, ALDERMEN, AND BURGESSES OF THE BOROUGH OF BRISTOL 322

QUALIFICATION for votes for parliament 95, 104
See PARLIAMENT. 4, 7.

RAILWAY COMPANY—*Scire facias against Shareholders under* 8 & 9 *Vict. c.* 16, *s.* 36—*Filing the return to the fi. fa.—Service of Rule for sci. fa.—Practice.*] To entitle a creditor to a sci. fa. against a shareholder in a railway company, under the 36th section of the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), it is not necessary that the sheriff's returns to abortive writs issued against the company should have been actually filed at the time of the motion. Though the notice to the party sought to be charged must be served personally, the rule nisi for the sci. fa. may be served upon an attorney authorized to accept service for him.
THE ILFRACOMBE RAILWAY COMPANY *v.* THE DEVON AND SOMERSET RAILWAY COMPANY; *Re* LORD POLTIMORE 15

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3. ———————, liability of, on contract to carry by a particular train 339
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4. ———————, liability of, for negligence in keeping a level crossing 631
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REASONABLENESS of condition in a contract made with a railway company 339
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RETURN to fi. fa. against railway company not necessary to file before moving for a scire facias against a shareholder 15
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REVISING BARRISTER: *See* PARLIAMENT.

RIGHT OF ACTION, suspension of, by delivery of promissory note .. 556
See PROMISSORY NOTE. 1.

RIGHT OF WAY—*User—Prescription—Excess.*] The defendant being entitled by immemorial user to a right of way over the plaintiff's land from field N., used the way for the purpose of carting from field N. some hay stacked there, which had been grown partly there and partly on land adjoining. The jury found in effect that the defendant in so doing had used the way bonâ fide, and for the ordinary and reasonable use of field N. as a field:—*Held*, that the mere fact that some of the hay had not been grown on field N. did not make the carrying of it over the plaintiff's land an excess in the user of the right of way.
WILLIAMS *v.* JAMES 577

RULE IN SHELLY'S CASE: *See* CONSTRUCTION. 4. 511

RULES OF STOCK EXCHANGE, effect of, upon a contract .. 228, 504
See COMPANIES ACT, 1862. 1, 2.

SALE of cotton "to arrive," construction of 431, 677
See CONSTRUCTION. 7, 8.

SALE OF GOODS—*When Property passes.*] It depends on the intention of the parties whether the property in goods, to which something remains to be done before they are ready to be delivered, passes to a buyer at the time of the sale or on the completion of the goods. A., a brickmaker, who was in embarrassed circumstances, sold to B., to whom he was largely indebted, a large quantity of bricks. B. sent an agent to the brickfield with an order for the delivery of the bricks,

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and A.'s foreman told him he was ready to commence delivering them if a man, who was in possession under a distress put in by the landlord, was paid out, and he pointed out three clamps, one consisting of finished bricks, a second of bricks still burning, and a third of bricks moulded but not burnt, as those from which he should make the delivery. A. having become bankrupt, the landlord sold some of the bricks, and B. sold the remainder to C., who removed them. In an action of trover by the assignees of A. against C. for the bricks:—*Held*, that the conduct of A.'s foreman was a sufficient appropriation of the bricks, and that the property in the whole of them, though unfinished, passed to B. at the time, such having been apparently the intention of the parties.

YOUNG AND ANOTHER *v.* MATTHEWS 127

2. SALE OF GOODS—*Warranty of Title—Undertaking to deliver, or that the Buyer should be permitted to carry away the Thing Sold—Evidence.*] A boiler set in brickwork, and capable, if taken to pieces, of being removed without injury to the premises, had been seized and sold under a distress for a poor-rate due from the occupier, and bought at a public auction by the defendant, and re-sold by him to the plaintiffs at an advanced price, with notice of the circumstances under which the defendant had bought it, the plaintiffs to remove it at their own expense. The mortgagees of the premises upon which the boiler stood having prevented the plaintiffs from carrying it away, the plaintiffs brought an action against the defendant, relying upon an alleged implied warranty that he had good title to the boiler, and that they should be permitted to remove it:—*Held*, by Bovill, C.J., and Montague Smith, J. (dissentiente, Willes, J.), that there was no evidence to justify the jury in finding a warranty as alleged.

BAGUELEY AND ANOTHER *v.* HAWLEY 625

3. ————, "to arrive," construction of 431, 677
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SHERIFF—*Poundage and Fees—What amounts to a Levy under a Writ of fi. fa.*] A sheriff's officer went with a warrant to the defendant's premises for the purpose of levying under a fi. fa., and, without saying or doing anything more, produced the warrant and demanded the debt and costs, together with poundage and expenses of levy. The money was paid under protest:—*Held*, that this did not amount to a levy, so as to entitle the sheriff to poundage or the officer to fees.

NASH *v.* DICKENSON 252

SHIP AND SHIPPING—*Bill of Lading—Perils of Navigation—Rats.*] Goods were shipped under a bill of lading containing the usual exceptions of "the act of God, the Queen's enemies, fire, and all and every other dangers and accidents of the sea, rivers, and navigation, of what kind and nature soever." The goods were injured during the voyage by rats, though the shipowner had taken all possible precaution to prevent it:—*Held*, that the cause of injury did not come within the exception, and that the shipowner was liable.

KAY AND ANOTHER *v.* WHEELER AND ANOTHER .. (Ex. Ch.) 302

2. ——————, *Charterparty, Construction of—Freight payable "on right Delivery of Cargo"—Concurrent Acts.*] By the terms of a bill of lading freight was to be paid "one third in cash on arrival at B., and two thirds *on right delivery of the cargo*, by good and approved bills payable in London at four months, or cash, deducting usual interest, at the option of the shippers." The vessel arrived at B. The one third freight was paid, and the consignee of the cargo declared his election to pay the remaining two thirds in cash less interest:—*Held*, that the delivery of the cargo and payment of the balance of the freight were to be concurrent acts, and that the master was not bound to deliver the cargo unless the consignee paid or was ready and willing at the same time to pay the balance of the freight.

PAYNTER AND OTHERS *v.* JAMES 348

3. ——————, *Marine Insurance—Constructive Total Loss of Freight—Suing and Labouring Clause—Particular Average—Evidence of Usage amongst Underwriters.*] The plaintiffs effected an insurance with the defendants on the chartered freight of a ship, for a voyage from C. to E. The policy contained the usual suing and labouring clause, and a warranty against particular average. During the voyage the ship was so much damaged in a storm that it put into R., where it became a total wreck. The goods were landed and forwarded in another ship to their destination, at an expense less than the chartered freight, and on their arrival the chartered freight was paid. In an action to recover from the underwriters a proportionate part of the expense incurred in forwarding the goods by the second ship:—*Held*, that there would have been a total loss of the freight at R. if the goods had not been forwarded, and that the plaintiffs were entitled to recover the sum claimed under the suing and labouring clause of the policy. At the trial, evidence was given that expenses incurred in preserving the subject-matter of insurance were not "particular average," but "particular charges," as those terms were understood in the business of marine insurance:—*Held*, that this evidence was admissible to shew the mode in which such expenses were treated by mercantile men; but that the usage proved by it was in affirmance of the common law, and did not control or vary the language of the policy.

KIDSTON AND OTHERS *v.* THE EMPIRE MARINE INSURANCE COMPANY .. .. (Ex. Ch.) 357

4. ——————, *Charterparty—Construction of Guarantee.*] A. chartered a vessel from I. to L. with a full cargo of petroleum. A. being unable to supply the cargo, the owners of the vessel agreed to

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cancel the charterparty, and seek for another cargo, on A. guaranteeing the vessel a "sum of 900*l.* gross freight home." The owners procured a cargo whose estimated freight would have amounted to 556*l.* 14s., but the vessel was lost on its way home:—*Held*, that the owners were at any rate entitled to recover from A. the difference between the estimated and guaranteed freights, if not the whole freight of 900*l.*

CARR AND ANOTHER *v.* THE WALLACHIAN PETROLEUM COMPANY (LIMITED) .. .. (Ex. Ch.) 468

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——— c. 36, s. 1 144
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——— c. 125, s. 3 314
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———, s. 37 174
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